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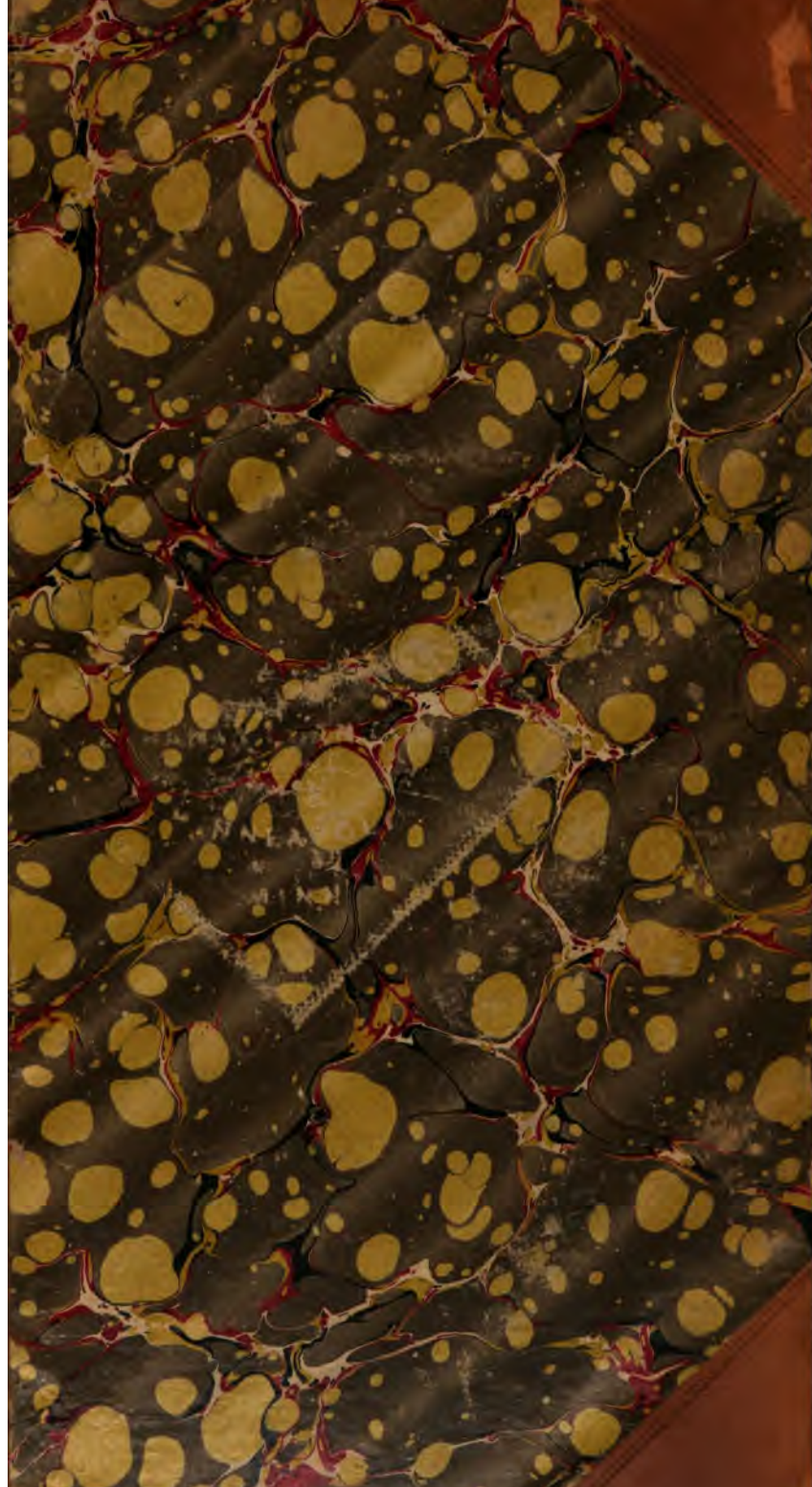
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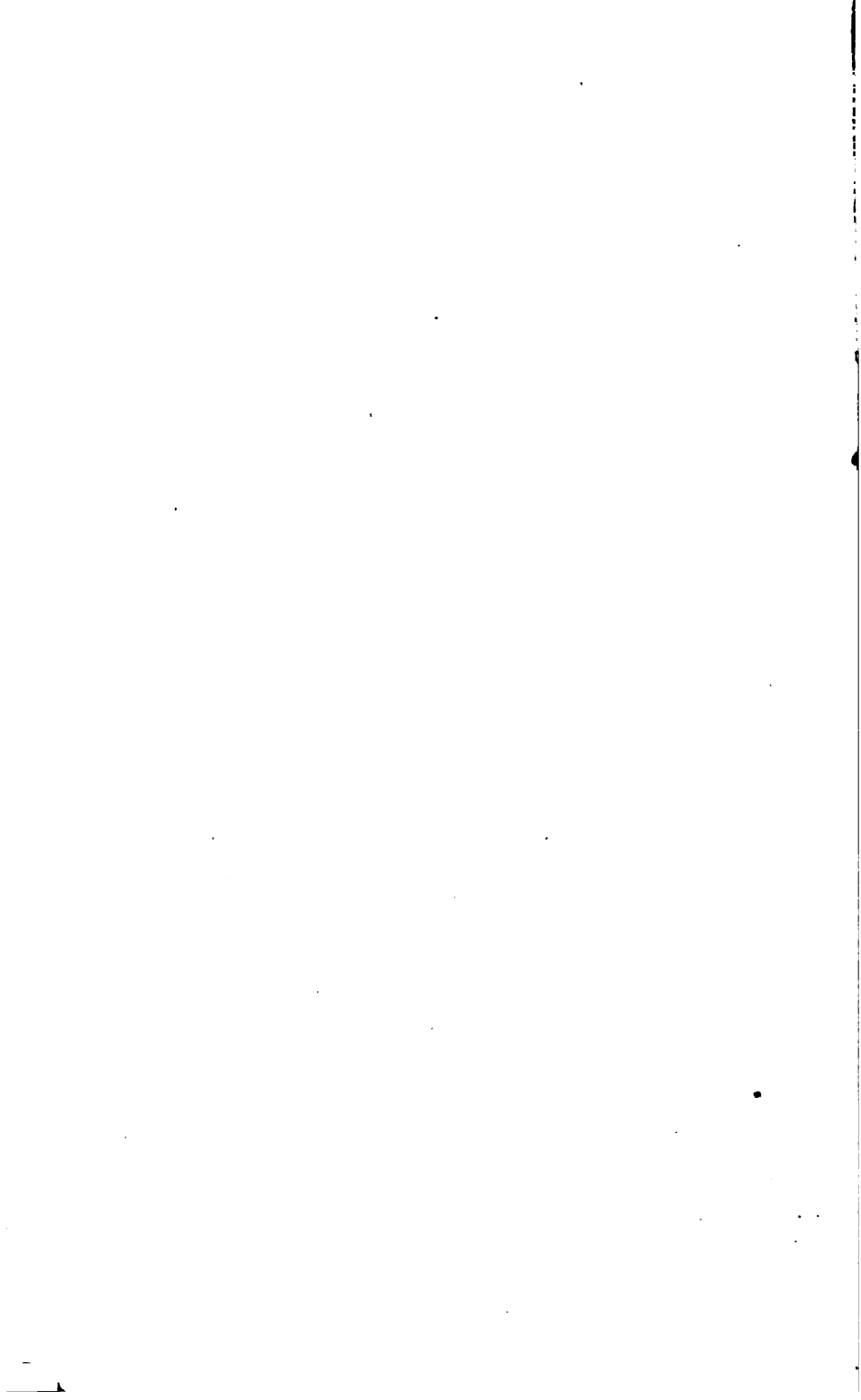
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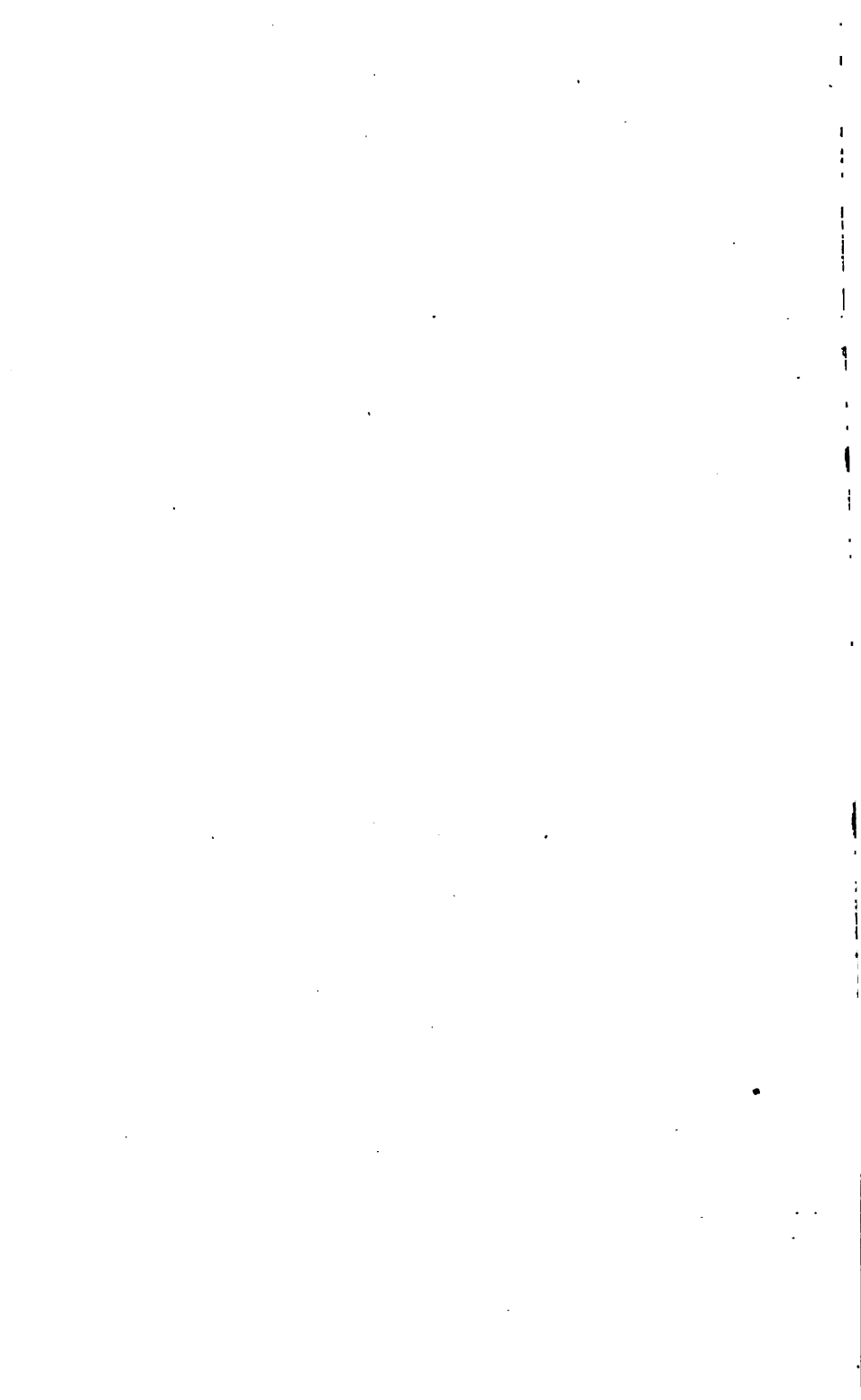


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VOL. V.



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THE LAW REVIEW.

ART. I.—LIFE AND WRITINGS OF SAVIGNY.

Essai sur la Vie et les Doctrines de Frederic Charles de Savigny.
Par EDOUARD LABOULAYE. Paris, 1842.

WE have selected this elegant, yet at the same time philosophic, Essay as the subject of an article, not so much for the purpose of exercising the powers usually assumed by, or performing the duties understood to be incumbent on, professed critics, as to make the English student of Law, and our English readers generally, better acquainted with some of the views of General Jurisprudence which of late years have come to be entertained on the Continent. From birth and residence in a colder climate, and perhaps from more advanced age, our ideas are not so vivid or fervid as those of our enthusiastic, but truly estimable author; and we are not so sanguine, as he is, in our anticipations of the future destinies of Jurisprudence. But, in general, if we do not entirely coincide, we in a great measure participate in his views; and, as the pamphlet is short, and too much condensed to admit of an analysis, and detached quotations would not be doing justice to the author, we think we cannot better discharge our duty, than by a simple translation, as literal as practicable, of the greatest part of the Essay, with a few introductory remarks. For, while we trust M. Laboulaye will, with his accustomed liberality, as a high-minded lawyer, excuse the free use we thus make of his work, we conceive we shall, in this way, enable the reader to form an adequate notion, not only of the amiable, yet dignified character, of the splendid talents, and of the vast learning of

the great man whom our author desires to celebrate, but also of the practical soundness of the scientific doctrines, ingenious, yet profound, which Professor Savigny has, with so great energy, inculcated for upwards of forty years. Nor will it lessen the weight of these doctrines, when we find, that they are not only taught from the chair by the Professor, but supported in the cabinet by the Statesman; M. de Savigny being now the Minister of Justice of the present King of Prussia.

I. M. Laboulaye commences his Essay with the following observations on the recent improvements in the study and cultivation of Jurisprudence on the Continent. "There is not a just idea formed in France of the rank, which jurisprudence is called upon to hold among human sciences. For most people, Law is nothing more than the art of logically interpreting the words of the legislature; it is a professional science, useful for the Judge, the advocate, and the student, but which excites no interest, beyond the limits of the school, or the court-hall. This erroneous opinion, which mistakes the practical end of the science for the science itself, has exercised upon the development of jurisprudence a most fatal influence. Our lawyers, absorbed, like those of England, in the exclusive study of the law and of precedents, have voluntarily remained strangers to that movement of regeneration, which, of late years, has revived in France History and Philosophy; and, by a lamentable, but inevitable consequence, history and philosophy, when excluded from jurisprudence, have lost, by this exclusion, their most extensive field for study and application."

Such a separation, were it to last, would be fatal to every science, and especially to jurisprudence; which, deprived of its natural support, would sink, to rise no more, to the level of a trade. But happily, in our days, all the sciences are linked together, and the progress of one forces on the development of another. At present every thing presages that we are approaching the desired epoch, when philosophy, history and jurisprudence will march together, hand in hand, towards the common end of their efforts, the amelioration of the condition of mankind. History has already made the

first advances towards the accomplishment of this union, M. Guizot, M. Thierry, M. Guérard, have already, in some measure, made themselves jurisconsults, in order to snatch by surprise from the Middle Ages the secret of their organisation. Is it too much to hope, that in their turn, some one of our lawyers, enlarging the sphere of his studies, will overleap the narrow circle of the Code Civil; and reascending to the summit of the declivity of the ages which have elapsed, will ask of History, what remains to be told of those institutions which our fathers have bequeathed to us, and which our sons will receive from us by inheritance. When it shall be seen how much good, in a political age like ours, a man of talent may extract from the study of antiquity and of the Middle Ages, and how rich in lessons is that Past, with which we are so little acquainted, because hitherto we have observed it only superficially, it will then be understood, what a science Jurisprudence is, and how much to be deplored it should have been so long neglected. That science will then be restored to the rank which belongs to it — that mixed science, which partakes at once of history and philosophy, the common point where tradition and speculation meet, the touchstone of both. Grotius, Montesquieu, Leibnitz, Kant, Fichté, Hegel, met each other on this intermediate ground; and it is there, let us not doubt, the greatest minds of our age will again meet.

To be convinced of the high destiny, to which Jurisprudence is called in our days, it would be sufficient to study the part, which she has acted in Germany within these last twenty years. Not only has the Science been transformed, but, by giving to opinions a direction quite different from that of the last age, by awakening the love of national institutions, by connecting the present with the past, by the intelligent cultivation of what the past has left, of the great and the useful, she has transformed the nation. This intellectual movement has had from its origin a political character, of the most remarkable kind. By exalting the national sentiments, it has given to Germany a force, a vitality, of which, in France, the energy is not suspected. The youth have been brought back to the impartial study of

the ancient Institutions; the University education has been able to become political, without inconvenience; and Germany has known how to create a power by a new mode of instruction, which we dread as a danger. Prussia, especially, has profited by the movements which proceeded from herself; and in an age when opinion is supreme, Berlin, resting upon, and confiding in, her Universities, has caused herself to be recognised as the intellectual capital of the North.

To expound the development which the Science has taken in Germany since 1814 would be a tedious and difficult task, and would fatigue the reader; for this development, of which the character is principally historical, has been made by a thousand researches, scattered, insulated, and having nothing in common, except having diffused light, in all points, upon the institutions of antiquity and of the Middle Ages. But fortunately a man is here met with, whose life, for forty years, has been so intimately connected with the movement in Jurisprudence, that to retrace this fair life is to narrate the history itself of the Science. This man, who was the first to re-establish in Jurisprudence the study of History — who gave the first move to this scientific revolution, as he has directed its march, and regulated its progress — who first also, and alone, perceived the necessity of giving a philosophical basis to this study, that it might not go astray in the pursuit of an useless curiosity — that Jurisconsult, whose genius, although he has arrived at the age when repose is allowable, has assumed a new phasis, pursuing with the ardour and success of his better days, the immutable ideal of Jurisprudence, the union of theory and of art; that learned man, whose name, forty years of labour and of glory have rendered European — every body has already perceived is **FREDERIC CHARLES DE SAVIGNY**. And not only is the history of his life interesting to Science, but that life is also, at the same time, by its moral grandeur, one of the most excellent models, which can be offered for the imitation of men, who devote themselves to study. For forty years, M. de Savigny has had only one motive, the Science; only one interest, the Science; only one idea, the Science. The object and end which he had proposed to himself at twenty years of age he still pursues, without

having deviated from his course. This strong direction has always raised him above the miseries of the chief, or leader of a party, as above the dazzling seducements of fortune. In the performance of the high functions to which his genius led him, M. de Savigny has uniformly preserved his character of a Jurisconsult and learned man. The minister of state has never belied the professor: a noble example in an age, when so many upstarts (*parvenus*) abandon Science, as a mantle which was good for nothing, but procuring advancement in life, and, stripped of this borrowed dress, exhibit only the hideous skeleton of pride and ambition.

II. Laboulaye proceeds to give a brief, but interesting account of the birth and education of M. de Savigny, combining with it a short notice of the Dutch and German schools of law.

Frederic Charles de Savigny was born at Frankfort, the native city of Goethe, the 21st February, 1779. His family, of French origin, as the name indicates, had come 150 years before to ask a shelter for their persecuted creed. In this country of their adoption his ancestors had filled honourable stations: his grandfather had been director of the Regency of Deux-Ponts, and his father represented, at Frankfort, the Princes of the circle of the Upper Rhine. Educated by his mother, an ardent Calvinist, in sentiments of piety, which he had all along cherished, it is, doubtless, to that profound religion that he owes the constancy of his life. In 1792 he had the misfortune to lose his mother: his father had died the year preceding. At thirteen years of age, an orphan, and without kindred, he was placed under the care of one of his father's best friends, M. de Neurath, Assessor to the Imperial Chamber of Wetzlar, and a lawyer sufficiently conversant with what was then called the public law of Germany. M. de Neurath made his pupil share the education, which he gave to his son; and as soon as the two youths had attained the age of fifteen years, he himself gave them a complete course on the science of Law, such as it was then understood in Germany. He had to learn by memory, from enormous folios, digested according to the taste of the times into axioms, mathematical demonstrations, the Natural law, the law

of Nations, the Roman law, and the German law. And what a Natural, what a Roman law! A vocation less irresistible than that of our future Cujacius would infallibly have succumbed. Happily M. de Savigny soon quitted these arid studies. He entered, in 1795, the University of Marbourg, then, as now, one of the less important in Germany; but in which our young savant had the good fortune to meet a man who was to exercise over his future life a decisive influence, Professor Weis, who belonged to what was then called the school of elegant jurisprudence. It was towards the end of the seventeenth century that this school made its first appearance, and its native country was not France, but Holland. After the revival of juridical learning, of which, in the sixteenth century, France had been the principal theatre (a movement which continued during the first half of the following century), and of which Fabrot and Jacques Godefroy were the last representatives, the Science took a twofold direction. In Germany, Thomasius, a philosopher, become a jurisconsult, endeavoured to effect in jurisprudence the radical reform which Descartes had introduced into the other branches of human knowledge. Breaking loose from the opinions of the age, Thomasius made a *Tabula Rasa* to give to the Science a basis purely philosophical, and to withdraw it at once from the influences of History and Theology. Banished from Leipsic, as an impious innovator, strictly watched in the existing universities, this learned revolutionist founded Halle, that he might breathe more at ease; and inaugurated, with an unheard-of success, these theories of Natural law, which, for more than a century, predominated in German jurisprudence. In Holland, on the contrary, the tradition of the French School was continued; it might have been said, that Science had emigrated with the French refugees, and Leyden, Utrecht, Gröningen, were the direct Heiresses of the splendid universities of Bourges and Toulouse, which became mute under the great Monarch.

Every thing concurred to favour the progress of the Dutch Universities; freedom of opinion, the tranquillity and wealth of the nation, the situation of the country, intermediate between Germany and France, every thing, in short, even

that considerable commerce in book-selling, of which Amsterdam and Leyden were the centre. The movement was also most remarkable; but, by a singular phenomenon, this movement had not depth: it was made, in some measure, on the surface, without penetrating into the country, without exercising any influence on the legislations of Europe: its character was purely literary, and Leyden was less an university, than an academy. The chiefs of the Batavian School distinguished themselves by an exquisite taste, a pure Latinity, a profound acquaintance with classical antiquity; but they were rather philologists than jurisconsults; and to judge from their writings, one would say, the principal object in studying the Roman law, from which they never deviated, is to illustrate Plautus, Terence, or Cicero! Gérard Noodt, Bynkershoek, Schulting, Otto, Reiske, were the leaders of this literary School; who have still, in our days, found worthy representatives in Cras, in Van Hall, in Anne den Tex; but the greatest name in that school is that of a jurisconsult, who lived in the last century, the German Heineccius.

Born in Saxony in 1680, Professor, first of philology; then of philosophy; then at last of jurisprudence; called in 1724 to Franequer in Holland; soon recalled by Frederic, who refused to give up to the States-General this glory of Frankfurt and of Halle, Heineccius, half a German, half a Batavian, debated with himself all his life between philology, jurisprudence, and philosophy. This uncertainty or wavering would have ruined a superior mind: it made the fortune of this genius of the second order. The apparent clearness of his ideas, his lucid style, the art with which he knew how to avail himself of the discoveries of others, the skill with which he tempered the logical severity of the German form, with the graces of the Historical School; all these qualities gave Heineccius an influence almost to be compared with that of Cujacius, and this influence has continued down to these late years throughout Europe.

This success of Heineccius is explained by the universality of his labours. In the works of this jurisconsult, as in an *Encyclopædia*, minds of the most different tastes found an agreeable and easy nourishment. Heineccius had written,

without any preference, upon all the branches of jurisprudence, and, giving up his own opinions in self-denial, he had known, how by his admirable method, to place the systems of the age within the reach of the most mediocre intellects. His mind, of infinite suppleness and versatility, took, without effort, the form most suitable for each kind of work. For the admirers of Natural Law he had abridged Grotius, Puffendorf, Wolff, and Thomasius; for those who, led astray by some words of Leibnitz, ill understood, demanded from the Roman law the rigour and precision of a mathematical demonstration, he had digested the Pandects into axioms; finally, for those who sought in history a less dry study, he had written those "*Antiquities of the Roman Law*," which still remain, at this day, the most perfect model of that kind of work. It was, in fact, towards the study of history and philology that the natural inclination of his genius led him: it is in this department that he excelled:—witness his "*Elements*," and his "*Antiquities of the German Law*:" it was in this department also that he exercised over Germany a happy influence, in awakening the taste for historical studies.

Thanks to the impulse given by Heineccius, Germany soon had no longer any thing of which to envy Holland, and the disciples whom he had formed, following the example of their master, set themselves about searching with ardour both Roman and National Antiquities,—a pure and fruitful mine, which solicited to be wrought. Püttman, Selchow, Biener, Moeser devoted themselves to the study of the sources of German law; but the Roman law preserved the greatest number of worshippers. Among all, Augustus Bach distinguished himself by his excellent *History of Roman Jurisprudence*.

It was to this school of Romanists that Professor Weis belonged; and he himself, taking up the work where Bach had left it, had undertaken the history of the Roman law during the period of the Glossators. Weis's was, like the greater part of the jurisconsults of the Batavian school, a mind which had more elegance than profundity, more literature than jurisprudence; but he had a pure taste, which

kept him aloof from the dull metaphysics which then reigned in the schools, an ardent love for the Science, and the talent, so precious, of communicating that love to his pupils. It was he, who brought over Savigny to the historical school of the eighteenth century, by giving his young intellect a passion for that Roman law, of which the beauty has always had the privilege of seducing superior minds: it was he who, putting the riches of a valuable library at the disposal of his favourite disciple, knew how to interest him in the destiny of Roman legislation, as in that of a friend; induced him to follow it, not only to the epoch of its glory, but even during that transformation, obscure, and till then unknown, which it underwent in the course of the ages that followed the conquest of the Western Empire. In short—and we cannot pronounce a greater eulogy upon M. Weis—it is to the inspiration of his Professor that M. de Savigny owes one of his most beautiful works, the “History of the Roman Law;” it is to M. Weis that the Science owes Savigny.

In the month of October, 1796, M. de Savigny went to the university of Göttingen. These university pilgrimages are among German habits, and contribute not a little to enlarge the minds of the students by the variety of lectures and of methods, and to maintain emulation among the professors, by the desire of seeing flock to their Courses young men from all parts of Germany, who come to hear the lectures of a famous master. From Göttingen, where, except the historian Spittler, (was Hugo not there at that time?) he heard no remarkable professor, M. Savigny returned to complete, at Marbourg, the course of his studies. In 1800 he took the degree of doctor; and the dissertation which he composed on this occasion already announced the most happy talents. Although Germany is rich in compositions of this kind, that of Savigny has continued to be celebrated for the elegance of its Latinity, the clearness of the ideas, and perfect knowledge of the subject; and I remember that, on visiting the library at Tubingen, the first object which struck my eyes, on the tables at which the students laboured, was a collection of dissertations, lying open at the Thesis of Savigny, and of which the blackened pages attested how often,

in the course of forty years, there had been sought and perused, in this volume, the first great work of the master. Doctor at twenty-one years, independent by his character and by his fortune, M. de Savigny, whose vocation in life was already decided, became professor; or, to use an expression which has no analogy in our language, because the position which it designates has no appellation, *Privat Docent*. This is the name given to the free professor, who does not form a part of the university, and teaches without other salary, than the remuneration contributed by the students who voluntarily attend his lectures. This institution, peculiar to the universities of Germany, is considered in that country as the most direct cause of the prosperity of the system of instruction; for it opens a free access to new ideas, and maintains among the professors a perpetual emulation.

In France the professorship is a sacred office, which admits only a small number of the elect, who have come off victorious after a long and difficult initiation. In Germany, on the other hand, the professorship is a militia service, into which all volunteers are received. Whoever is conscious of a decided vocation for teaching; whoever feels some idea ferment in his head, he, after trials severe enough, but which have nothing in them to alarm, mounts a chair, and professes at his own risk and peril. Politics being kept apart, the *Privat Docent* teaches what he pleases, and as he pleases. He re-models, if he thinks fit (and this happens every day), the course even of the professor whom he has quitted the preceding evening. In this scientific contest the oldest captains are not irritated by the ambition of their young rivals; for they know that the empire of Science, like that of Alexander, belongs always to the most worthy, and that for a professor, there is no repose till the day of his retirement. I have known the most noble minds of Germany encourage and support the first appearances of their late disciples, now become their competitors, without ceasing to be their friends. Far from dreading the youth of a Professor, they saw in that juvenile ardour a guarantee of success; and many times have I heard these words repeated, "that to make a good professor, the first condition is, not so much to know the

Science profoundly, as to have a passion for it, and to communicate to his audience the sacred fire; that youth only can excite such sympathies; and that the most learned man is not always equal to the young master, who learns the Science, even with those to whom he teaches it. A course of lectures, in fact, is not a book, and the part of the professor is by no means that of the writer. "To write," says Goethe, in a passage which M. de Savigny has appropriated, to paint in it himself, — "to write is to abuse speech; and the impression of a solitary perusal is but a sad substitute for the living energy of language. It is by his personality, that man acts upon man, and especially youth upon youth. It is then that the impressions are the strongest and the most pure."

The first appearance of M. de Savigny justified the words of Goethe: from his first lecture, he hurried his audience along with him. Few men, it must be owned, have been more felicitously endowed for teaching: an elevated stature; a grave and mild physiognomy; something of the soft and inspired look of Schiller; great nobleness of speech and gesture; the fire of profound conviction; elevation of thought; in a word, all the qualities of body and mind concurred to render this young man an accomplished professor. "I know no instruction," says Grimm, "which made upon me a more profound impression than the lectures of Savigny. It appears to me, that what so powerfully attracted and captivated his auditors, was the facility and the liveliness of his speech, joined to so much calmness and self-possession. Oratorical talents may dazzle for a while; but they do not attach. Savigny was never at a loss for expression, and he rarely consulted his notes. His diction always clear, his conviction profound, and at the same time a kind of self-restraint, and moderation in language, made an impression, which the most ardent eloquence would not have produced. Every thing concurred in him to give effect to his discourses."

III. Our author next gives an account of M. de Savigny's first publication in 1802, "On the Law of Possession," and of his subsequent honourable advancement to a Chair in the University of Berlin.

Savigny gave successively Lectures on Criminal Law, on

the last Ten Books of the Pandects, on Ulpian, on the Law of Succession, Methodology, and the History of the Roman Law. This multiplicity of lectures, which astonishes us, has this advantage, that the young professor, by trying himself in the different branches of teaching, seeks, and at last ascertains the natural direction of his genius: this was what happened to M. de Savigny. In 1801, while he lectured in the last ten Books of the Pandects, one of the most delicate theories of the Roman law, Possession, engrossed all his attention. As he had applied himself to study the Texts, he was astonished at the discrepancy which he found to exist between the laws themselves and the commentators. Weis, to whom he submitted his Researches, strongly urged his young disciple to publish a special work on a subject, as interesting from its difficulty, as from its practical importance. The Law of Possession, composed during the winter of 1802, appeared at the commencement of the following year; and from its appearance had a great and well merited success. This success, a thing rare for a book on Jurisprudence, has not fallen off even to this day; and the book, attacked more than once, has remained for these forty years past the most important which has been written on that difficult doctrine. If it is one of the marks of genius, to be always prepared to find out and satisfy the actual wants of the Science, it may be said that this characteristic has not failed in M. de Savigny, and that never did a book answer better than his to a real demand. There was in all minds a desire to renew scientific methods: people were so tired of the arbitrary divisions so much in fashion during the preceding century, of those pretended philosophical theories, of all that bastard scholastic doctrine which embarrassed and stifled jurisprudence, that everywhere there was felt the necessity of restoring to Science its youth, and of refreshing it in these pure springs, where thought imbibes new life. Already had Hugo raised at Göttingen the standard of Reform: he next attacked with a sharp criticism the idols of the last age: he had made a breach in that pretended Natural law, which served as a convenient mask, behind which each so-called philosopher concealed his reveries.

Hugo now attacked with great energy Civil Jurisprudence. He resolved to carry the sword into that inert mass, which the practitioners transmitted to each other from hand to hand, without adding any thing but new errors: of each institution Hugo demanded its origin, its object, the reason of its existence: the historical reform was then quite complete. But Hugo had more talent to criticise than to found; and in this domain of criticism, it was rather as a professor, that he acted, than as a writer. His doctrine was, therefore, destined to move within a narrow circle, till the time when Savigny came to give it a body; proving by a master-work that there was life and futurity in the method, which the Professor of Göttingen had restored to honour.

Hugo, in fact, did not, any more than Savigny, then think of founding a new school: they believed themselves to belong to the school of Cujacius, who appeared to them the most perfect model of a jurisconsult. The Law of Possession is quite in the manner of a Master. It is a book of one single idea, largely developed, and which pervades all the work, without any parasitical discussions projecting beyond the foundation. One cannot help admiring the wisdom, which presides in the order of the whole, and in the arrangement of its parts; but, I venture to say, this book, admirable from its method, is not one of those works, which, in revealing some fruitful principle, open a new era in Science. We recognise in this treatise a young man, who, recently admitted into the sanctuary, does not carry his views beyond the texts which he studies. Savigny here takes the Roman law as an infallible point from which to start, throws aside the thorns with which the commentators had covered this ancient monument, restores to light the Roman theory, disencumbers it of the entanglements under which the German law and practice had stifled it, and when he has finished this work of reconstruction, reposes, delighted with the form, and thinking but little of the political importance, or even of the practical interest of the doctrines, which he has restored.

The success of the book, spreading over all Germany, the name and the method of the young professor brought him the most advantageous proposals. Heidelberg and Greifs-

wald offered him a chair on the most splendid conditions. The competition of the German universities keeping all eyes open to the merit which begins to display itself, is not one of the least advantages, of that organisation, from which we have so much to borrow. M. de Savigny did not accept these proposals. Having lately married, he had reserved to himself some years of leisure, in order to accomplish the scientific travels which were to finish his literary education. He visited the libraries of Heidelberg, of Stuttgard, of Tübingen, of Strasburg, making everywhere researches, copies, extracts, for that "History of the Glossators," with the idea of which Weis had inspired him. In the month of December, 1804, Savigny came to Paris. An unfortunate event occurred on his arrival, which occasioned him a great deal of vexation and regret. There was stolen from behind his carriage a trunk containing all his papers, the fruit of his researches in the different libraries of Germany, and so many unfinished labours, which were never recommenced, for that would have required a return of the early ardour of youth, and the buoyant, happy disposition which had inspired them. In Paris he lived near the Library, resorted to it every day, and had copies made for him of several French manuscripts; among others, the unpublished letters of Cujacius.

In 1808 M. de Savigny accepted the first place in the University of Landshut, to which some years previously there had been transported the ancient and celebrated University of Ingoldstadt. His residence in Bavaria was not of long duration. In 1810, M. William de Humboldt, Minister of Public Instruction in Prussia, caused him to be offered a chair in the new University of Berlin. Savigny accepted immediately, less from any views of personal interest, than from hatred of the foreign domination, which then oppressed the south of Germany, and from devotion to the country, which, by its energetic resistance, remained the last hope of German nationality.

War had rendered us undisputed masters of Germany; but the Emperor, it must be admitted, had made a strange abuse of victory, when, wounding the people in what they held

most dear, he had wished to annihilate German nationality, and to transform into French departments, the fairest provinces of the ancient Empire. The kingdom of Westphalia was the most insolent defiance which conquest could adopt. A king, who was merely the prefect of his brother; a court which was not held in the country; ministers foreign to a nation whom they pretended to govern, were to the German patriots a cruel injury, an affront more hard to bear, than was for us the invasion of 1815; for, if the fate of arms was adverse to us, foreigners, at least, have never governed us. Prussia combated to the last moment, to preserve the menaced nationality; and when laid prostrate by the bloody defeat of Auerstadt, mutilated by the treaty of Tilsit, it became necessary to renounce Halle, that university altogether Prussian, the rival of Leipsic, the creation of Thomasius, it was with accents of despair that King Frederic William separated himself from this ancient jewel of his crown: — “Dear inhabitants of our faithful provinces,” wrote he in a proclamation of the 21st July, 1807, “you know my sentiments and the deplorable events of last year. Our arms have been defeated: we must accept peace such as circumstances impose: we must break asunder those ties which ages had sanctioned, the most sacred compacts, love and confidence. Fate ordains it: the father is separated from his children; but neither fate nor power shall erase from my heart the remembrance of you.”

To this afflicting appeal the professors of Halle had answered, by approaching close around the King, and requesting the creation of an university at Berlin itself. This project, delayed until the departure of the conquerors who occupied the city, was then executed upon a large plan. At the request of William de Humboldt, the magnificent palace of Prince Henry was given by the King for the accommodation of the university, and an annual endowment of 150,000 dollars was granted to the new establishment. To the faithful professors of Halle,—Beyme, Schwalz, Hufeland, Niemeyer, Schleiermacher, there joined themselves, Niebuhr, who had become a professor from patriotism, Eichhorn, and de Savigny. Then commenced, with an ardour like that of

a crusade, lectures which, far from allowing Prussia to descend from the literary rank in which Thomasius had placed her, raised her if possible still higher, and notwithstanding her disasters and reverses, maintained Berlin as the capital of German civilisation. "Ah!" said Niebuhr, who in this movement played one of the principal parts, — "what a delightful time was that, when the university of Berlin was opened! those days of inspiration and of happiness, during which I lectured and composed this book (the Roman History); to have known them, and to have seen the year 1813, were sufficient, alone, to render a life happy, notwithstanding the hardships experienced during the rest of it."

Between Niebuhr and Savigny there was established a warm friendship. Savigny was the first auditor of those extempore discourses, when Niebuhr, in all the impetuosity (phrenzy) of his imagination, created from all kinds of writings a new Roman world; and, like the Arabian storyteller, while he charmed all those who heard him, was himself captivated with the wonders of his own fancy. Niebuhr, on his side, could not separate himself from this grave and severe friend, whose genius rendered his own more perfect; and in the Roman History, where the Dane pours out in each page the overflowings of his heart, the name of Savigny often occurs as a cherished remembrance.

IV. Our author proceeds to give an interesting account of the celebrated dispute, which took place in Germany at the time of the general peace in 1814 and 1815, between M. Thibaut and M. de Savigny, and their respective adherents, on the important subject of Codification.

The wars of 1814, which were so fatal to us, restored to Germany her independence; but when the foreign tide retired, the most grave political questions appeared: the business to be done was nothing less than to reconstruct all that great country. Of the ancient German Empire, overturned by conquests, there remained only ruins. The French Institutions were regarded as a vexatious memento of ten years of wars and defeats. In political organisation, in the laws, in the institutions, every thing was to be re-founded. It was then that a voice came from Heidelberg to offer to

Germany a project, which wanted neither interest nor grandeur. The success of 1814 had been achieved by the awakening and the sudden expansion of the national mind. The combat had been, not for Prussia or Austria, but for the common native land, Germany. In this struggle petty provincial jealousies had completely disappeared. The desire and the conviction of the necessity of union was in all hearts; the Congress of Vienna, which then deliberated, laboured in its fashion to lay the foundation of that unity in the secularisation of the ancient ecclesiastical principalities, in mediation among that crowd of petty princes, whose independence and jealousy had caused the weakness of the country; the course was fair, and the occasion favourable for all the friends of their country. Thibaut believed the moment had arrived for demanding a code, which should be common to all Germany, and which, since political unity could not be expected, might maintain at least the national unity, by unity in legislation and in the teaching of the law.

“There are two conditions,” said he¹, “which ought to be required of every legislation,—that it should be as perfect as possible both in form and in substance; in other words, the language of the laws ought to be clear, exact, precise; and the institutions ought to correspond to the wants of the nation. Unfortunately, there is not a country in Germany where even one of these conditions is fulfilled, or half fulfilled. Our German law is nothing else than a confused mass of contradictory regulations, which counteract and annul each other. It might be said, that our legislation undertakes the task of rendering Germans strangers to each other, and of preventing judges and advocates from ever acquiring solid knowledge. And even although we should possess profoundly this legal chaos, we should not have made much progress with all this erudition. For our national law is so incomplete, so imperfect, that of a hundred questions which present themselves, there are always at least ninety-nine which are decided by some one

¹ Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland. 1814.

of the foreign legislations, which we have adopted in our tribunals: I mean the Canon law, or the Roman law. It is difficult to imagine any thing more disastrous. Except what concerns the constitution of the Catholic Church, the Canon law has no sort of value, it is a heap of dispositions, obscure, mutilated, incomplete: often these regulations are merely a blunder of the first interpreters of the Roman law; and there is revealed in it a tendency so decided in the spiritual power, to encroach in the affairs of this world, that a wise government ought to search elsewhere for its rules of decision.

“There remains the last and the most important source of our legislation, the body of the Roman law, that is to say, the work of a foreign nation, a work accomplished at a period of the most profound decline, and which, at each page, bears the vestiges of decrepitude. The blindness of passion alone could have induced any one to congratulate the Germans on having received into their legislation this undigested work, and seriously to advise its conservation.”

“It is (say they) an infinitely complete collection. That is incontestable; in like manner, as it would be true to say, that Germany is infinitely rich, because it possesses all the treasures concealed in its soil down to the centre of the earth. To extract these treasures without expense — there is the difficulty. I shall say quite as much of the Roman law. It is, beyond doubt, that jurisconsults of profound science, of a penetrating intellect, of a patience that will stand every trial, will succeed in establishing, upon every point, a complete system, which they will know how to discover in the scattered fragments; and that, in a thousand years, perhaps, we shall be fortunate enough to obtain a classical and complete work, upon the thousand important points which now-a-days are still buried in chaos. But of what importance is it to the country, that good views and rules are preserved in some learned books? What is necessary for it is, that the law, in a manner, live in the head of the judge and of the advocate, that it be easy to acquire a complete knowledge of the law. This is what will be always impossible with the Roman law.”

These criticisms, which struck many people as just, resounded through Germany. As a savant, and as a patriot, Thibaut found an echo in all hearts. Feuerbach at Munich, Schmidt at Jena, Pfeiffer at Cassel, united themselves to the Professor of Heidelberg, in order to demand a code, which would extricate Germany from the extreme confusion into which her jurisprudence had fallen. The views of Pfeiffer resembled very much the wise views, which had presided in France over the composition of the Code Civil. Pfeiffer, a man of practice and of experience, did not desire any sudden and rash innovations; but he wished to carry the axe into the juridical labyrinth, and he demanded a code which, without innovating, should pronounce upon the doctrines which were to be followed, and upon those which were to be rejected; in a word, a code new in form, old in substance or at bottom.

The ideas of reform were rapidly gaining ground, when there appeared on the arena an unexpected adversary, M. de Savigny. The treatise which he published on this occasion, under the title of "*The Vocation of our Age for Legislation and Jurisprudence*," caused a deep sensation, which has not yet been effaced. This writing, destined to survive the circumstances which had led to it, was nothing less than the confession of faith of a new school, which broke loose from the methods of the last century, and, under the name of the Historical School, openly declared war against the reigning system. The contest also was carried on from the first moment with extreme keenness; Hugo and Schrader supporting Savigny, Feuerbach and Goenner defending Thibaut. Even now, at the distance of twenty-five years, the fire still lies smouldering under the ashes, and the discussion has been kindled up more than once; for on this field, though narrow in appearance, there is debated the perpetual contest of the two tendencies, which divide the human mind, the historical tendency and the philosophical tendency.

Considered in this general point of view, the dispute of 1814 is, for us, a matter of real and true interest; for the question, which was then discussed in Germany, is now agitated among us in the high regions of jurisprudence, in the

administration and the constitution even of the country. Whenever we go to the bottom of the systems which divide public opinion, we find, as the chief reason of their contrariety, the two tendencies which I indicate; and it is not the jurisconsults only, who would gain by meditating upon the value and the force of the views, which M. de Savigny has expounded and defended.

The question of codification, which was for Thibaut the principal question, had in the eyes of Savigny only a secondary importance. Our jurisconsult did not deny that it would sometimes be convenient to give a neat, fixed form to the existing usages; according to him, that set form, from its suspending the natural march of jurisprudence, had more inconveniences than advantages; but in certain circumstances it might be necessary to have recourse to it. In short, upon this question Savigny took for his motto the 64th aphorism of Bacon:

“That it would be desirable that the revision of law should be made in an age, superior in science and experience to the ages, whose acts and monuments are revised. For,” added the Chancellor, “it is pitiable, to see an age ignorant, and without wisdom, mutilate and restore without taste the works of antiquity.”

Now had Germany, then, arrived at the epoch desired by Bacon? And, above all, did political circumstances then permit such a reform to be seriously thought of? On this point, in combating codification, Savigny gave proof of a patriotism not less ardent than that of Thibaut, and of an intellect more steady and more wise. In theory nothing is more beautiful, nothing politically more useful than unity of legislation. Half a century of ignorant or passionate declamation will take nothing from the merit of our codes. But for Germany, in 1814, this fair project was quite impracticable to any good effect. It could not be expected, that Prussia would renounce her Land-Recht, or Austria the code which she had established only a few years before; and that, in order to accept a new code, upon the composition of which people had difficulty in understanding each other, and could not be expected completely to agree. In raising, then, the

question of codification, only one solution, which it was easy to foresee, could be arrived at,—the composition of a code, peculiar to each of those petty kingdoms, created by the Congress of Vienna, which being no longer restrained by the connection with, and the respect for the ancient majesty of the Empire, would all aspire to independence and to absolute sovereignty. The political result of these codes, a result equally foreseen, and equally dreaded by the two adversaries, was to give a body to the factitious divisions of diplomacy; it was to create Badeans, Hessians, Bavarians, who would be distinguished, at least by their civil law, from Saxons and Prussians; it was to render more and more strangers to each other, by that diversity of jurisprudence, which leads to diversity of interests, people, who were children of the same stock, and who had hitherto had one and the same basis of legislation. And, in fact, whatever were the defects of the ancient jurisprudence, it had at least this merit, that its principles were admitted, under the name of the common law, by all the tribunals of Germany: further, this common law was taught in the universities, the great corporations, to whom Germany has owed, down to this day, the progress which it has made towards unity. What behoved to happen, when a particular code should introduce into the system of instruction the same diversity, as in the jurisprudence? Would it not be to sacrifice the result painfully attained through several ages of efforts—unity by teaching? That Savigny had reason to express this dread, I leave to be judged of by all those who have followed with any attention, the march of the German universities, during the last twenty years. Let them say, whether there is not now a marked inclination in all the governments to create, in some measure, provincial universities; an inclination, which discloses itself in a distressing manner in the exclusive choice of professors of the particular country, and in the exaggerated development of certain parts of the course of instruction.

V. Having stated the result of the discussions on the subject of codification in 1814 and 1815, so far as applicable to the particular state of the people of Germany at that time, as sufficiently matured in intelligence, or not, for

making the experiment with success, and as in connection with the political state and views of the different governments of Germany at that period, M. Laboulaye proceeds to the general discussion of the question, as universally applicable, and as a question of science : —

“ The political question being discarded, there remained a scientific question, which, for Savigny, constituted the true point of difficulty. It was not solely upon codification that our lawyer differs materially from the opinion of Thibaut ; between the views of these two men there lay an abyss. Savigny was sensible of this contrariety, and it was in seeking to account to himself for this disagreement, that he founded a doctrine which distinguishes the historical school from the ancient French and Dutch schools, with which it has, in other respects, more than one point of contact ; and from the non-historical school, of which Thibaut was, if not one of the soundest, at least one of the most spirited champions.

“ There prevailed, then, in Germany, as at present in France, an opinion too easily received, viz. that the legislator is all-powerful in modifying and changing institutions, and that every thing can be done by force of laws. This idea, false from its exaggeration, and which gives to a man over the manners and the destinies of a nation an influence which, happily, cannot belong to him, was a bad remnant of the philosophy of the eighteenth century ; it was a consequence of those opinions, which, confounding law and morality, admit a law of nature or a law of reason, a perfect ideal of legislation, of which the different codes are only a transient alteration, and which equally suits all nations and all ages. It is thus, that in our days Bentham, the most perfect representative of these false theories, went about, offering to country after country, to Maddison, President of the United States of America, to the Governor of Pennsylvania, to the Emperor Alexander, to the Cortes of Spain or of Portugal, that eternal civil or penal code, which was to suit indiscriminately countries, however different in manners, in climate, in past progress and advancement. Thibaut, without going so far as Bentham, shared, nevertheless, like the lawyers of

his age, these same opinions. It was from the legislator, that he wished to obtain, what Savigny expected only from the science.

“Thibaut had little belief in the importance of historical studies, because he did not admit the influence of the national character on the development of legislation. Private law, especially, seemed to him to be in a manner written in the human heart. It was a rule to which our mind and our reason rose of themselves, and which had no occasion to bend or adapt itself to circumstances. He termed law *Juridical Mathematics*, upon which times and places have no hold or bearing. For him, historical studies were nothing but the researches of an idle erudition, and he did not hesitate to say of the lawyers of the school of Savigny what Mallebranche said of certain savants:—‘The savants study rather to acquire a chimerical greatness in the imagination of other men, than to give to their mind more strength and enlargement. They make of their head a sort of wardrobe or museum, in which they heap up, without discrimination and without order, whatever bears a certain character of erudition; I mean whatever may appear rare and extraordinary, and excite the admiration of other men. They glory in assembling in this cabinet of curiosities antique pieces which have nothing rich and solid, and of which the price or value depends only on fancy, passion, or chance.’ According to Thibaut, ten lessons on the laws of Persia or of China were more useful than the interminable researches of all the commentators on the variations of the Roman succession. All those performers of Micrology, as he pleasantly called them, so proud of and so happy in their imperceptible discoveries, reminded him of those good Spanish monks, who gloried so much in possessing a piece of the ladder which Jacob saw in a dream, the most wonderful, assuredly, of all the relics. Of that *Past*, of which Savigny accepted the inheritance with devotion, Thibaut said what Winkelmann wrote of the Greeks,—‘The ancients were so great, only because they had not our science, that is to say, the art of knowing what others have known before us.’ And with regard to the succession of laws, of which the Berlin pro-

fessor admired the marvellous connection, Thibaut chose, on that point, to be of the opinion of that good devil, Mephistophiles :

Es erben sich Gesetz und Rechte,
Wie eine ew'ge Krankheit fort,
Sie schleppen von Geschlechte sich zum Geschlechte,
Und rücken sacht von Ort zu Ort ;
Vernunft wird Unsinn, Wohlthat Plage,
Weh dir das du ein Enkel bist.¹

“ This direction of ideas, which was not confined to Thibaut, rendered all codification dangerous ; for far from securing to Germany a national law, a code compiled by unskilful hands might impose on it a legislation, vague, of mediocrity, and which would have by no means favoured the unity desired to be established. The example of France, held up by Goenner, could not be an authority ; for, besides that nobody wished any thing resembling our codes, and that it was the fashion to abuse our civil laws, with as much injustice as bad taste, Savigny remarked with reason, that in France the eminent merit of our practitioners, the good sense characteristic of the national genius, the perfection of the language, had been able to preserve from the dangers of a sudden or rash innovation ; but that nothing similar could be hoped for in a country, where the pure science absorbs all superior minds (*les bons esprits*), and where practice finds none to embrace or occupy themselves with it, but the worst species of people, theorists who have remained in the old route. Confidence could not be had, according to a sprightly expression of Bluntschli, in the physicians who presented themselves ; for they were, of all, themselves the most sick or diseased. Besides, had not people before their eyes the sad example of the Bavarian Criminal Code ? This work, digested by Feuerbach, the first criminal lawyer of Germany, discussed during nine consecutive years by three learned Commissions, had introduced merely a legislation, which it

¹ “ Statutes and laws succeed each other like an everlasting disease. They creep and crawl from generation to generation, and move slowly from place to place. Reason becomes folly ; a good deed or benefit a plague. Woe to thee that thou art one of the family.”

was found impossible to execute; and only two years after its appearance, one hundred and eleven novels had overturned, in the most essential points, this dream of a theorist. To this example of the little vocation or capacity of Germany for legislation, it was easy to add the Land-Recht, the Prussian code, which Savigny, in a movement of enthusiasm, might place above the Code Civil, but which is nevertheless one of the most awkward, or stupid (*lourdes*) compilations which ever issued from the hands of men, and which, allowing particular customs to continue, without serving except as supplementary legislation, has all the practical inconveniences of a code, without having, in the least, the political advantages.

“Why, then, does law thus elude the grasp of man? What is its nature and its character? It is to this question that Savigny was irresistibly brought back; and the following is his solution: —

“ ‘As far as we go back into History, we see that the civil law of each people has always its determinate and peculiar character, like habits, manners, the constitution itself. Law is not, then, an absolute rule, like morality, or an institution indifferent, and which does not belong to the country; on the contrary, the law is a function of the national mind, it is a manifestation which has no proper life of its own, a capacity of the nation, which reflection separates and abstracts, but which does not exist by itself with a distinct entity. As the human body changes and develops itself perpetually by an insensible movement, so does the social body; the law is one of the forces or faculties of this great body, and not a garment, which may be put on, taken off, or changed, at the pleasure or the caprices of the day. At all epochs, the law maintains itself in an essential relation with the nature and character of the people whom it rules; and its development cannot be better compared than to the progress of language. In language, as in law, there never is a time of absolute stoppage; both are subjected to the same march, and to the same alterations as the other modes of the national activity; of both the progress is (*fatal*) fated or destined. The law, like the language, grows or increases

with the nation, suffers and prospers with it, and perishes, when the nation disappears. In short, the law is born, and always develops itself in a customary manner (*de façon coutumière*), if I may be allowed this expression; it exists in a latent state, in the manners, and in the public opinion, before being realised in legislation. Its force, or power, is internal, and by no means proceeds from the arbitrary determination of the legislator. Laws are written; they are not invented.'

"What part, then, belongs to the legislator, and what influence can he exercise over the law by legislation, properly so called? The part of the legislator, said Savigny, is a secondary part. To remove the obstacles which obstruct or impede the march of the institutions in progress, to give by the legislative sanction juridical life to institutions which are established, in some manner, of themselves; to cut off all dead or parasitical branches, in a word, to play the part of the *Prætor* at Rome, or of the ancient French parliaments, when they pronounced decrees, or passed acts of regulation (*Arrêts de Règlement*),—this is all that belongs to the legislator; and if, mistaking his mission, he endeavours to put his own ideas in the place of the national ideas, he will miserably confound all legislation. The function of the legislator is then one of the most delicate; for it demands, as Bacon required, a perfect knowledge of the ancient institutions, a superior intelligence of the new wants; there is required, in this respect, extreme prudence, great experience in human affairs; and it would be folly to allow any profane person to undertake, with impure hands, this mysterious operation. Now, added M. de Savigny, in these days neither men nor the science, nor even the juridical language, are fit or sufficient for this great work; we must still wait. When, by earnest studies, we shall have acquired a more profound knowledge, when we shall have suitably exercised our historical and political faculties, we shall be able to pass a judgment upon the subject-matter submitted to us. Let us still doubt, and let us not hasten to take up the dissecting knife of the surgeon, for we might cut living flesh, and incur in future the most dreadful responsibility. No precipitation. When the Jewish people chose not to wait on

Mount Sinai for the laws of God, they made for themselves, through their impatience, a calf of gold; and to punish them the true tables of the law were broken in pieces.

“From this legislative theory, Savigny deduced the method of studying and of teaching the law. ‘The character of our school is not, as some new adversaries have unjustly reproached it with, an exclusive estimation of the Roman law, any more than the absolute maintenance of certain doctrines; on the contrary, we are carefully on our guard against falling into such errors. The object of the science, such as we understand it, is to trace to its first root every doctrine transmitted to us by the past, and to discover its organic principle, so that what still lives in this doctrine may be detached from what is dead, and now belongs only to history. The body of jurisprudence which we have received is composed of a triple element—the Roman law, the German law, and the successive modifications of these two primitive elements. The Roman law, without speaking of its historical importance, has this advantage, that by the high degree of cultivation at which it had arrived, it serves at once as a model and an ideal for the modern science. The German law has not this advantage; but to make amends, there is one circumstance through which it prevails over the Roman law; it is more inherent in our manners and habits, and if I dare use the expression, it has a nearer, stronger hold of us; and because its ancient forms may have disappeared, it would be a great error to conclude that it has retired from our legislation. The substance of these forms, the national spirit which had inspired them, has survived even these forms; and more than one German institution is destined still to be revived, both in the constitution, and in private law; I speak of the spirit of these ancient institutions, and not of the letter; but it is by studying the letter, that we jurisconsults learn to know and divine the spirit. Finally, we must not neglect the alterations, which these two primitive elements have undergone. In the long course over which they have run, to come to us, there has been more than one transformation required by the wants of the nation, or brought about by the influence of lawyers. This latter influence has even acted more forcibly

than the former ; and to determine the part which the jurists have performed, we should have a history of jurisprudence during the middle ages. In the study of this last source of our law, the principal effort ought to be equally directed to separate the living element of the actual jurisprudence, from all that inert mass with which the ignorance or folly of the last ages have encumbered us.'

"Such is the doctrine to which M. de Savigny has attached his name ; it approaches, in more points than one, to the analogous ideas formed in our days by the excellent minds, who, in France, have regenerated history and philosophy. To recognise in all moral science the element, which ages transmit from hand to hand, to discuss that element, and after a just criticism to secure to it its legitimate share of influence, to consider the present as an arch thrown between the past and the future, and never to forget that we cannot break it up on one side without falling into the abyss,—these are, it should seem, irreproachable data, and yet all new. It is by this recognition of the legitimate rights of the past, that our age is called upon to distinguish itself from the preceding age ; this will be its share, I doubt not, in the progress of civilisation ; and this share will suffice to render its name not inglorious in future times."

VI. M. Laboulaye next proceeds to illustrate the extent of the views of M. de Savigny :

"The views of M. de Savigny have thus an extent much greater, than is usually supposed in France ; jurisprudence is not their only aim or object, and they are destined to appear in a sphere more vast, I mean that of political science, which in reality is nothing else, than one of the most elevated aspects or phases of jurisprudence. This political science (for it is a science quite as real as philosophy and mathematics, although people doubt this not a little, looking to the march of affairs)—this science will gain singularly by being studied in an historical point of view, and it is one of the subjects which, in our country, ought in the most lively manner to engage the attention of men of talent ; for in such a study there is at once glory for the writer, and immediate utility for one's country.

“When, instead of considering the state as a machine, of which we can at will change the wheel work, it shall be seen by attentive observation, that a people is a great being, having, like a single man, an organisation, a mind (*esprit*), a peculiar vitality, then there will be sent back to the world of chimeras all those theories which have no reality, except in the brain of their inventors. An Utopian, who should propose to substitute, in place of the languages of modern Europe, the Chinese or the Sanscrit, would be laughed at. Is it less ridiculous to give our charter to the Turks, and to create, in words, powers, when these powers do not exist in the country? It is not chance, beyond doubt, which has divided Europe among French, English, Germans, Russians, and created a French, German, Russian, or English language; each of these languages belongs to, depends upon, or corresponds to the very genius of the people; so it is with the civil legislation, and with the political legislation of each of these great nations. Their laws are a part of their social existence. To impose upon a nation arbitrary forms of government, without consulting the elements which exist, is as impracticable, and much more dangerous, than to realise an universal language. Political ideas have their fated, destined development, like juridical ideas, like literary ideas; and the whole social body suffers and is oppressed whenever an unskilful hand opposes or counteracts their natural tendency—a hint to those great men of the day, who imagine they create laws and found institutions, when they write a few lines upon a piece of paper, that is forgotten next day; and who despair of society, because it resists, by the energy of its vitality, the remedies of ignorance and quackery.

“To consider merely the scientific interest, what a difference there is between studying political science according to the abstract maxims of the Utopians, or by the patient observation of history. When I read some of these great systematic writers, a Rousseau, a Hobbes, a Fichté, a Hegel, it seems to me that society, such as they represent it, is a company of players; kings, people, families, individuals, all the world, live with a borrowed existence: it is the breath of the machinist, which animates these personages of the theatre:

the illusion is sometimes pushed to the last degree of possibility, and almost reaches reality ; but it is merely an illusion. The book being shut, as soon as we wish to realise the fancied political system, this imaginary world vanishes ; and as there is at the bottom of all these systems nothing but one and the same egotistical thought, the merciless result of all these doctrines is, despotism placed at the top, or at the bottom of society. Revolutionists and tyrants, democrats and despots, have always found in these *Natural* systems the justification and the consecration of absolute power. At the outset Hobbes and Rousseau shake hands with each other ; they again meet at the end of their journey, to found despotism, the one under the name of royalty, the other under the name of the sovereignty of the people. On the other hand, when we study political science in history, we enter, from the first step, upon a new world ; there is no longer that uniformity of words and thoughts, which reveal but too clearly the hand of the theorist ; there is, on the contrary, human activity in all the variety of its development. Each people fulfils its function, as a laborious workman ; each has its destination, like its particular physiognomy ; each labours for itself in its own peculiar interest ; and in the hands of the master, who is God, the egotistical, selfish labour of each becomes useful, and is lost in a common work, which is the profit, the advantage, and welfare of all. Thus, in this great workshop, in which civilisation is elaborated, each nation has its own part and its peculiar serious mission ; in the north the mine of thought is driven to the last vein ; in the south the form is given to it which makes it live ; every where movement, every where variety, every where life, but a life peculiar to each nation, and not only to each nation, but also to each of the individuals of whom that nation is composed. And all those passions which agitate, and all those ideas which rouse, all these forces, in a word, more various than contrary, which make the life of nations, have in each country, and in each age, a destined direction, a forced inclination. The function of the legislator is, to study the direction of the river, and to hollow out for it its bed, if he does not wish that the waters, enlarged by resistance, should some day carry

away a government which obstructs them, and lay waste a country which, if well directed, they would have fertilised and enriched.

“In transferring into the science of politics the doctrines which Savigny applied to civil institutions, we perceive there is a great analogy between the opinions of the German savant and those which M. de Maistre published at the beginning of the century; but M. de Maistre, whose views were somewhat enigmatical or obscure, and whose language is always cruelly ironical, was little understood by an age, of which, in more points than one, he was in advance. His genius frightened rather than persuaded; he has left admirers, and not one disciple. M. de Savigny, on the contrary, has from the first day been the chief of the school in a manner, in spite of himself; thanks to the moderation of his views and of his character. Every body was eager to place himself under the banner of so amiable a master, and his first disciples were men who, more aged than himself, might have still disputed with him the first place; I mean, Haubold, Hugo, Cramer, Niebuhr, who all came to range themselves under the new standard, followed by a crowd of young savants, who have since acquired a reputation in the science, such as Eichhorn, Grimm, Dirksen, Hasse, Unterholzner, &c.

“In order to give to the new school a voice, an instrument to proclaim its principles and to defend them against the attacks which came from Heidelberg and Munich, Savigny, in connection with Eichhorn and Goeschen, founded the *Journal of Historical Jurisprudence*. In the introduction which he prefixed to the first Number, he resumed with new force his ‘Profession of Scientific Faith,’ a symbol adopted by all, whom the North of Germany reckoned distinguished minds. Thibaut, in the ‘Annals of Heidelberg,’ answered Savigny with the courtesy of an adversary, who attempts more to shine and dazzle, than to convince; but Goenner at Munich was less measured in his language, and pronounces with violence against the school of Berlin: Savigny, on his side, replied with sharpness and bitterness. Goenner, at the time of the Conquest, had adopted with eagerness the Code Napoléon, and in the eyes of Savigny this adoption was an

act of cowardice and baseness (*lâcheté*); but his reply nevertheless went too far, and Goenner certainly did not merit the kind of contempt, with which he was refuted. Polemics, however, suited ill the excellent mind and the excellent heart of a man, who had entered upon the science, not to destroy but to found, and who had no wish to use in the quarrels of party, an activity entirely devoted to the advancement of the science. After his reply to Goenner, Savigny renounced polemics for ever; and when, fifteen years afterwards, he put together the pieces of this grand discussion, he determined not to add to it, what he had written against Goenner; *having*, he said, in *no respect* changed his opinions, but having no desire, after the lapse of many years and the death of his adversary, to revive a discussion, quite of circumstances, and which had taken the character of a personal polemical dispute. I do not see that M. de Savigny has since that time departed from that wise reserve, at least I do not know that the acrimonious attacks of the most rude adversary whom the historical school has met with (I allude to M. Gans), have induced our jurisconsult to break the prudent silence which he had imposed upon himself."¹ We shall conclude this notice in our next Number.

¹ It may perhaps excite surprise, that I do not dwell at greater length upon the attacks of M. Gans, and on the pretended philosophical school which raised its flag against that of the historical school; but it is because, in reality, and notwithstanding his prodigious mind, M. Gans has never formed a sect: he is the sole master, and the single disciple, of that school, which transported the doctrines of Hegel into jurisprudence; and even yet he has not come to the end of the course which he had taken. The last volumes of his history of the law of succession are as wise, and as *historical*, as the first are *philosophical*. The work of Gans is *un tour de force*, not a system.

ART. II — THE LAW OF ESTATES.

CHAP. III. ESTATES FOR LIFE.

WE shall now inquire, *first*, what an estate for life is; *secondly*, how this estate may be acquired; *thirdly*, how it may be held or enjoyed; and *fourthly*, how it may be aliened.

And *first*: *What an Estate for Life is.*

Estates for life are of two kinds, either expressly created by deed, will, or other legal assurance, or deriving their existence from the operation of some principle of law.

In this chapter we shall treat only of the first. A tenant for term of life is, says Littleton, speaking of this kind¹, “where a man letteth lands or tenements to another for term of the life of the lessee or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech he which holdeth for term of his own life is called tenant for term of his life, and he which holdeth for term of another’s life is called tenant for term of another’s life,” or more commonly *pur auter vie*.

This is Littleton’s definition, that given by Mr. Cruise² is more extensive and equally correct: “An estate for life is a freehold interest; the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.” This estate may exist not only in corporeal but also in incorporeal hereditaments.³

It is in most respects similar to the *ususfructus* of the civil law, which is thus defined in Justinian’s “Institutes,” *Ususfructus est jus alienis rebus utendi fruendi salva rerum substantiâ*, for the tenant for life has a right to the possession and an annual produce of the land during the continuance of his estate without having the proprietary, that is, the absolute

¹ S. 56.

² 1 Cru. Dig. 104.

³ Co. Litt. 42 a.

Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits, during the continuance of his estate. He is also entitled to estovers; that is, to an allowance of wood for fuel, repairs, and the like, which he may take upon the land, without any assignment, unless restrained by special covenants; for *modus et conventio vincunt legem*; but affirmative covenants do not restrain.¹

Tenants for life may cut down timber trees, at seasonable times, for the reparation of houses and fences; but a tenant for life cannot cut down timber to build new houses, or to repair those that he himself has improperly suffered to fall into decay. And where he cuts down more timber than is necessary, it is waste, though he assert that he cut it down to employ it in future reparations.²

Where a tenant for life dies before harvest time, his executors will be entitled to the crops then growing on the lands, as a return for the labour and expense of tilling and sowing the ground; which the law calls *emblements*. This rule extends to every case in which the estate for life determines by the act of God, or the act of the law; but not where it is determined by the act of the tenant. Thus, if a woman who holds lands, *durante viduitate*, which is an estate for life, sows them, and afterwards marries, she will not be entitled to emblements, because her estate determined by her own act.³

The word “*emblements*” only extends to such vegetables as yield an annual profit, and raised by the yearly expense and labour of the tenant; so that if a person who is tenant for life plants fruit trees, or oaks, ashes, or elms, &c., or sows the ground with acorns, his executors will not be entitled to

the English law took no notice of feuds until they became hereditary at the Norman Conquest, and that fealty, as well as the other feudal incidents, were consequences of the perpetuity of fiefs, and did not belong to estates for life; but the better opinion held by Wright and Blackstone (2 Com. 120.) is as above. By the revised statutes of New York, vol. i. 718. s. 3., all estates are declared to be *allodial*, and here, therefore, this question does not arise. 4 Kent Com. 23. ed. 5.

¹ Co. Litt. 41 b.; 1 Cru. Dig. 108.

² Co. Litt. 53 b., 54 b.; Vin. Abr. Waste M.; 1 Cru. Dig. 109.

³ Oland's case, 5 Rep. 116.; 1 Cru. Dig. 109.

them. But if a tenant for life dies in August, before severance of hops, his executors shall have them, though growing on ancient roots.¹

The advantages of emblements are particularly extended to the parochial clergy, by the statute 28 Hen. 8. c. 11.

The under-tenants or lessees of tenants for life have the same, nay greater indulgences than their lessors, the original tenants for life; the same for the law of estovers and emblements with regard to the tenant for life is also law with regard to his under-tenant who represents him and stands in his place², and in those cases where a tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. As in the case of a woman who holds *durante viduitate*, her taking a husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant who sows the land and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her.³ The lessees of tenants for life had also a most unreasonable advantage, for at the death of their lessors the tenants for life, these under-tenants might, if they pleased, quit the premises and pay no rent to any body for the occupation of the land since the last quarter-day or other day assigned for payment of rent.⁴ To remedy which it is now enacted⁵ that the executors or administrators of tenants for life, whether strictly so or not⁶, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.

But although tenants for life are, as we have seen, entitled to reasonable estovers, they are prohibited from destroying those things which are not included in the temporary profits of the land, because that would tend to the permanent and lasting loss of the person entitled to the inhe-

¹ Co. Litt. 35 b.; Latham v. Atwood, Cro. Car. 515.; 1 Cru. Dig. 110.; Evans v. Roberts, 5 B. & C. 829.

² Co. Litt. 55 a.

³ Cro. Eliz. 461.; 1 Roll. Abr. 727.; 2 Bla. Com. 124.

⁴ 10 Rep. 127.

⁵ 11 Geo. 2. c. 19. s. 15.

⁶ 4 W. 4. c. 22.

ritance. This destruction is called waste, and is either voluntary, which is a crime of commission, or permissive, which is a matter of omission only. Voluntary waste chiefly consists:—1. In felling timber trees (except for necessary repairs);—2. In pulling down houses;—3. Opening mines or pits;—4. Changing the course of husbandry;—5. Destroying heir-looms. The estate is sometimes limited “without impeachment of waste,” and in this case the tenant for life has much greater power in all these matters.¹ But even here he is subject to the control of a Court of Equity when he interferes with ornamental timber, or commits similar devastation.²

The rules as to waste rather belong to a treatise on Equity than our present purpose, which is to present to the student the ordinary rules as to estates.

A tenant for life is not subject to the payment of any principal sums charged on the inheritance; therefore where he pays off an incumbrance of this kind, he becomes a creditor on the estate for the sum so paid, for otherwise he must be supposed to have paid it for the benefit of the persons entitled to the inheritance; but if a tenant for life does any act which shows an intention of paying off the charge for the benefit of the inheritance, he will not in that case be deemed a creditor.³ Tenants for life are, however, bound to keep down the interest of all incumbrances affecting the inheritance; and it has been determined that the rents and profits of an estate for life must be applied, not only in payment of all interest due during the possession of the tenant for life, but also of all interest due before the commencement of that estate.⁴

If the incumbrancer neglects for years to collect his interest from the tenant for life, he may notwithstanding collect the arrears from the remainder-man, though the assets of the estate of the tenant for life would equitably be answer-

¹ 2 Bla. Com. 122.; Bowles' case, 11 Rep. 82 b.

² Chamberlayne v. Dummer, 3 B. C. C. 549.; Aston v. Aston, 1 Ves. 264.

³ 1 Bro. R. 208, 218.; 1 Ves. jun. 233.; E. of Buckinghamshire v. Hobart, 3 Swanst. 199.

⁴ Tracey v. Hereford, 2 Bro. R. 128.; Penryn v. Hughes, 5 Ves. 99.; 1 Cru. Dig. 111.; Burges v. Mawbey, 1 Turn. & R. 96.

able to the remainder-man for his indemnity, and they remain answerable for arrears of interest accrued in his life-time.¹ The true principle on this subject is, that the tenant for life is to keep down the annual interest even though it should exhaust the rents and profits, and the whole estate is to bear the charge of the principal in just proportions.² In respect to a charge upon renewal leases, the tenant for life contributes in proportion to the benefit he derives from the renewed interest in the estate. The proportion that he is to contribute depends upon the special circumstances of the case, and the practice is, to have it settled on a reference to the Master.³

A tenant for life is enabled to incur any proper expenses for draining his lands, and to charge the same thereupon.⁴

Although every person having a freehold interest has a right to the custody of the title-deeds, yet Lord Hardwicke has said, it was the common practice for the Court of Chancery to direct the title-deeds to be taken from the tenant for life, and deposited in Court for the security of the persons entitled to the inheritance.⁵

In a case where the title-deeds of an estate had been sent to a Master in Chancery for the purpose of showing the title to a part directed to be sold, and the tenant for life after the sale had obtained an order that they should be delivered to him, the persons entitled to the inheritance moved the Court of Chancery to discharge that order. Lord Henley refused the motion, observing it was his opinion that the tenant for life should have the deeds, except when brought into Court under an order for safe custody.⁶

If lands are conveyed to a person for his own life, and that of A and B, the grantee has an estate of freehold, determinable on his own death and the deaths of A and B; nor can there be any merger of the freehold during the lives of

¹ *Roe v. Pogson*, 2 Madd. Rep. 581.

² *White v. White*, 4 Ves. 24.

³ *Ibid.* 9 Ves. 56; *Allen v. Backhouse*, 2 Ves. & B. 65.

⁴ 3 & 4 Vict. c. 55.; 8 & 9 Vict. c. 56.; 9 & 10 Vict. c. 101.

⁵ 2 P. Wms. 477.; 1 Atk. 431.; 1 Cru. Dig. 111.

⁶ *Webb v. Lord Lyvington*, 1 Eden, 8.; recognised in *Duncombe v. Mayer*, 8 Ves. 320.

A and B into the estate which the lessee has for his own life; because, though an estate for a man's own life is greater than an estate for the life of any other person, yet here the lessee has not two distinct estates in him, but only one freehold, circumscribed with that limitation as the measure of its continuance.¹

But an estate for life is subject to merge in the inheritance; therefore, whenever the tenant for life acquires the absolute property or inheritance of the lands, his estate becomes merged or drowned in the fee simple.²

An estate *pur autre vie* will also merge in an estate for a man's own life, the latter being the more valuable. Thus, if an estate be limited to a person for the life of another, remainder to himself for his own life, the first estate is merged.³

There are many cases in which the act of the tenant for life binds the remainder-man, as in the case of boundaries; if upon a difference as to a boundary the tenant for life acquiesces, and an adjustment takes place, the submission of the tenant for life, if without fraud, will be strong evidence against the remainder-man. So if tenant for life suffer easements to be enjoyed out of his lands it is just as good evidence against the remainder-man as if he were seised in fee.⁴

Fourthly: How an Estate for Life may be aliened. A tenant for life has the power of alienating his whole estate and interest, or of creating out of it any estate less than his own, unless he is restrained by condition.⁵ But if a tenant for life attempts to create a greater estate than his own, it must necessarily be void, upon the principle that *nemo dat quod non habet*. If, however, the person entitled to the inheritance is a party to the deed, there the tenant for life may join with him in conveying away the entire inheritance.⁶

Estates for life were until very recently, in some respects,

¹ Co. Litt. 41 b.; 1 Cru. Dig. 105.

² Co. Litt. 338 b.

³ Dyer, 10 b.; 11 Rep. 63 b.

⁴ Saunders v. Annesley, 2 Sch. & Lef. 101.; 2 Crabb's R. P. 74.

⁵ It seems that a condition prohibiting all alienation on pain of forfeiture is void, though the estate may be made inalienable in its original limitation, if given not for life, but *until* alienation is attempted. 18 Ves. 433.; 3 Swanst. 522. But see Bacon's Tracts, 243.; Burt. Comp. (737.).

⁶ Co. Litt. 42 a.

considered as strict feuds, being forfeitable for many of the causes for which feuds were formerly forfeited. Thus where a tenant for life took upon him to convey a greater estate or interest than that which he had, whereby the estate in remainder or the reversion was divested, such conveyance operated as a forfeiture of his estate for life, because it was a renunciation of the feudal connection between him and his lord; and the person in remainder or the reversioner might enter for the forfeiture.¹

Alienations of this kind might be either by deed or by matter of record. By deed, as if a tenant for life made a feoffment in fee to a stranger, it was a forfeiture. So if there were tenant for life, remainder to another for life, and both joined in a feoffment in fee to a stranger, it was a forfeiture of both their estates.² But now a feoffment has no longer any tortious operation.³ And no forfeiture was ever incurred by grant, lease for years, bargain and sale, or lease and release; and as fines and recoveries are abolished, and all hereditaments now lie in grant, this kind of forfeiture is since these statutes⁴ came into operation practically at an end.

A tenant for life may also forfeit his estate by disclaiming to hold of his lord, or by affirming or impliedly admitting the reversion to be in a stranger, upon the feudal principle that if the vassal denied the tenure he forfeited his feud. But as by the feudal law the vassal was to be convicted of this denial, so in the English law those acts which plainly amount to a denial must be done in a Court of Record⁵, to make them a forfeiture; because such act of denial appearing on record, is equivalent to a conviction upon solemn trial. All other denials that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, were by our law rejected, for such convictions might be obtained without any just cause; but the denial of the tenure upon record could never be counterfeited or abused to any injustice.⁶

¹ Gilb. Ten. 38.; Wright, 203.

² Co. Litt. 251 b.; 1 Cru. Dig. 112.

³ 3 & 4 W. c. 74.; 8 & 9 Vict. c. 106.

⁵ Bac. Abr., Estate for life, C.

⁴ 8 & 9 Vict. c. 106. s. 4.

⁶ 1 Cru. Dig. 113.

These denials therefore usually occurred in real actions, and as these are now for the most part abolished, this species of forfeiture now very rarely occurs.

Estates for life are also forfeited by attainder of treason or felony. Lord Hale says, if a tenant for life be attainted of treason, the King hath the freehold during the life of the party attainted; and in the case of felony, the profits of the land are forfeited during the life of the tenant for life.¹

By the common law, where a person was tenant *pur auter vie*, and died during the life of *cestui que vie*, the person who first entered on the land after his death might lawfully retain the possession thereof as long as *cestui que vie* lived by right of occupancy, because it belonged to nobody. But where the King had the reversion, no right of occupancy was allowed: for if the King's title and a subject's concur, the King's shall always be preferred; against the Crown therefore there could be no prior occupant.²

The right of general occupancy was taken away by the statute 29 Car. 2. c. 3. s. 12., repealed but re-enacted by 1 Vict. c. 26. s. 6., which enacted "That any estate *pur auter vie* shall be devisable by will, &c., and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple. And in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

By the statute 14 Geo. 2. c. 20. s. 9. repealed but re-enacted by 1 Vict. c. 26., reciting the statute 29 Car. 2., and that doubts had arisen where no devise had been made of such estates, to whom the surplus, after debts paid, should belong; it is enacted, "that such estates *pur auter vie*, in case there be no special occupant thereof, of which no devise should have been made according to the said act, or so much thereof as should not have been so devised, should go,

¹ Hal. P. C., vol. i. p. 251.; 1 Cru. Dig. 114.

² Co. Litt. 41 b.; 2 Comm. 259.; Geary v. Bearcroft, O. Bridg. 484.

be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

It was held by Lord Eldon, that the interest in an estate *pur auter vie* to a man, his executors, administrators, and assigns, beyond the debts belongs to those who are entitled to the personal estate¹; and it is now settled that executors and administrators may take a freehold estate as special occupants, as well of incorporeal as corporeal hereditaments.² It is enacted by stat. 1 Vict. c. 26. s. 6., that if the estate shall come to the executor or administrator, either by reason of special occupancy or by virtue of that act, it shall be assets in his hands, and shall go and be applied and be distributed in the same manner as the personal estate of the testator or intestate. Where an estate was limited to a man and his heirs, or the heirs of his body during the life of another person, no general right of occupancy could arise, for the heir or heirs of the body of such grantee might, and still may enter on the death of his ancestor, and hold the possession as special occupant, having an exclusive right by the terms of the original contract to occupy the lands during the residue of the estate granted³; and the better opinion seems to be that the heir in this case takes by descent, for the estate, though not an inheritance or fee (and therefore not subject to curtesy or dower, nor capable of being entailed), is a descendible freehold.⁴

We have already mentioned the benefits given by the common law to the lessees of tenants for life, but powers are usually inserted in settlements enabling tenants for life to grant leases, which shall be good against the persons in remainder or reversion, but the execution of such powers is usually clogged with many conditions for the protection of the successor, and that the estate may not in any respect be prejudiced.⁵

When an estate has been contracted to be sold, and the

¹ Ripley v. Waterworth, 7 Ves. 425.

² Ripley v. Waterworth, *ubi sup.*; Rawlinson v. Duchess of Montague, 3 P. Wms. 264 n.; Bearpark v. Hutchinson, 7 Bing. 178.

³ 1 Cru. Dig. 115.; Litt. s. 379.; Co. Litt. 41 b.

⁴ Litt. 739.; 1 Atk. 483.; 7 Ves. 443.

⁵ 1 Burr. 120.; 2 Crabb's R. P. 70.

vendor dies before the completion of the purchase, having devised the estate in settlement to one for life, or other limited interest with remainder over, and a specific performance is decreed, the tenant for life, or person entitled to other particular interest, is empowered by the 11 Geo. 4. and 1 W. 4. c. 60. s. 17., to convey the whole fee or other interest contracted to be sold, or in such manner as the Court shall direct.

ART. III.—NOVELS.

OUR legal readers will probably take for granted that this article is devoted to a dissertation upon that portion of the celebrated Corpus Juris, the Code of the Roman law, called the *Authentica* or the *Novels*—the rescripts of the Imperial lawgivers. But it is no such thing; we are about indeed to handle a legal subject, but not in reference to the works of Justinian. We are going to complain of certain among our modern novel or romance writers for their inattention to correctness when they come upon law subjects: they then expose themselves to the contempt of the learned, and they mislead the ignorant.

We do by no means require (nothing could be less just or rational) that whoever undertakes to write a tale, should first learn law. But we do consider that as law is no necessary part of a tale, and as the nature of the subject gives its author a perfect liberty either to bring his characters into courts of justice or to keep them far away from such haunts, the ingenious writer, imaginer, maker, creator of the whole facts has no business to bring on a contact with the law if he happens to be ignorant of it, and that he has himself alone to blame if, by touching on such matters, he shows his ignorance, and draws down censure or ridicule. So in oratory, no speaker is under any obligation to know the niceties or even the general features of the law; therefore, if any necessity compels him to touch on legal matters, his ignorance is not

to be blamed. But as he is not bound to take his illustrations from such a quarter, he is much to be censured if he volunteers to speak the language of the law, and, being wholly ignorant of it, falls into plain mistakes, just as no one in company, unless that of foreigners, is bound to speak French, and therefore is justly punished by ridicule should he unnecessarily talk that language and confound the genders. Thus, no one had a right to censure Mr. Windham for not being a lawyer; but then Mr. Windham, in beginning one of his most ingenious speeches,—that on the sale of seats in Parliament, was under no obligation to use a legal allusion, and when he chose to do so and fell into a blunder, he was justly criticised. Instead of plainly saying—“Let us begin the discussion by stating the case,” he chose to say—“Let us by opening the pleadings state the case.” Now, every lawyer knows that opening the pleadings is any thing but stating the case.

Mr. Pitt, himself a lawyer, and who had indeed but just left the bar, was still less excusable in using legal phrases incorrectly. He did so repeatedly—as when he said, meaning to deny some positive fact, inference and all, “In the name of my country I demur to the plea.” Now this was sonorous enough if you will, and therefore was preferred to a simple denial—but its inaccuracy lay in the circumstance that by demurring he admitted all the facts, which very certainly he did not mean to do. On other occasions, he was happy in his legal allusions. Thus, when Lord Loughborough, the Chief Justice of the Common Pleas, had laid down some very doubtful, indeed bad law, on the great question of the Regency, Mr. Pitt said, “I affirm that this is not law, even if it come from a judge.” So when, denouncing the Coalition, he concluded by saying, “If this ill-fated union be not completed, in the name of my country I forbid the banns.” Inferior men in both Houses make sad havoc with demurrers, appeals, leading questions, cross-examinations, justifications, libel, damages, retainers,—above all, with issues. Here they invariably say the reverse of what they mean. When they would say that they agree or concur with an adversary, they “join issue” with him, not being at all aware that this is the

word used by lawyers for expressing the most complete difference possible — a diametrical opposition on all points.

We apply the same remarks to our novel writers, and more especially to such of them as belong to the legal profession. Nothing can be less creditable to them than that their works should abound in bad law, especially when they had no occasion to give any law at all. Sir Walter Scott is one of the greatest culprits in this line, and we will give an instance which seems hardly credible, and can only be accounted for by the exceeding great hurry in which he wrote his novels, the cause of so many other defects, and of the feature almost in them all — the *peccat ad extremum* — the general slovenliness, haste, and want of finish in the winding up and close. This may be explained by his peculiar position at the time. But as to legal blunders, he really was without any excuse. He was all his life a Scotch advocate, had practised somewhat at the bar; was during the whole period of his authorship a sheriff, that is, the judge ordinary occupied in administering justice in every variety of cases over a considerable county; finally, he was a clerk of session, sitting daily for many hours in Court, and his life was passed in the society of Scotch lawyers. Yet we will venture to say, no English lawyer would have shown half the ignorance of Scotch proceedings in the accounts of them which are found in his novels; and no mere lay writer, no one belonging to either bar, and of either sex, could well have fallen into greater mistakes.

In the Heart of Mid-Lothian, as is well known, he makes the trial for a capital offence the main foundation of the story. A young woman is put on her trial before the Court of Justiciary at Edinburgh — and we think that we shall show that the account of this trial is a series of inaccuracies and blunders.

In the first place, we find it stated that counsel are only assigned to a poor party in Scotland. “The humanity of the Scottish law (in this particular much more liberal than that of her sister country),” says Sir W. Scott, “not only permits, but enjoins advocates to appear and assist with their advice and skill all persons under trial.” This is wrong; there is

no person whatever in England who may not obtain the aid of counsel by applying to the Court. In England no man, unless retained on the opposite side, can refuse; no case ever occurred of such a refusal, and no judge would hesitate to assign sufficient counsel if applied to. The humanity in this, therefore, is not exclusively confined to Scotland. A remarkable instance occurred of our judges interfering to protect the poor against the wealthy suitor. When Sir James Lowther, known for his oppressive conduct, had retained all the leaders, and many of the other barristers on the northern circuit, to prevent his adversaries from having sufficient assistance of counsel, the judge (Lord Loughborough) at once vacated the Lowther retainers. This, however, is unimportant; but in what follows Sir Walter is curiously inaccurate. *After* the prisoner had declared she was "not guilty," the account of the proceeding is thus continued:—"The Court next directed the counsel to plead to the relevancy, that is, to state on either part the arguments in point of law, and the evidence in point of fact, against and in favour of the criminal." *The counsel for the Crown* then makes a speech on the whole matter, law and fact, and "the counsel for the prisoner, a man of considerable fame in his profession, did not pretend directly to combat the arguments of the king's advocate," but then in truth states his whole case.

Now we apprehend the actual course is this. There is no opening of the evidence on either side, in one case in a thousand, and no debate on the relevancy, unless it is objected to *by the prisoner*, who must then proceed (as in demurrer) on the assumption that all the facts charged are true, and practically this very rarely happens. The jury are not impanelled till after the interlocutor of relevancy. But the names of the whole array are called over, and a sufficient number ascertained to be present before the indictment is read, or the prisoner pleads. In arguing the relevancy no facts can be noticed but those in the indictment.

We suppose, then, that it is not accurate to describe the pleadings on the relevancy as "stating the arguments in point of law, and evidence in point of fact, against and in favour of the criminal." As the judgment (or interlocutor) on

the relevancy, assumes the facts to be those set forth in the libel (or indictment), and pronounces them sufficient or insufficient to support the legal inference deduced, if any statement of fact is given it must be by a kind of abuse arising out of the other peculiarity which distinguishes the Scottish criminal trials — that the evidence is examined on both sides, without any opening speeches of counsel on either, and so this makes it desirable to have some preliminary statement in order that the evidence may be understood. But we never heard that the Crown lawyers gave their statement of the evidence as this account purports. Indeed, we question if the prisoner's counsel ever do so beyond a very limited extent, and for this plain reason, that it would be disclosing their own case and enabling their adversaries to shape theirs so as to meet it. The jury not being empannelled during this debate on the relevancy, a statement of the evidence to the judges who are not to decide upon it would seem, not *humane*, but ridiculous.

But the author makes the prosecuting counsel give a long statement not so much of the law, which alone was the matter before the Court, as of his whole case in point of fact. We then have the counsel for the panel, the "counsel of considerable fame," harangue on the subject of the Covenanters; but here having said something unpleasant to the Tories, Sir Walter adds, "his business was to carry his whole audience with him, if possible;" a thing, we should have thought, just as wide of his business as any thing well could be — for he was addressing the Court on a point of law, and certainly had nothing at all to do with "his whole audience."

But the "considerably famous" advocate goes on from blunder to blunder. The charge was one of murder, but the proof of concealing the birth of a child was the first requisite in support of the indictment; consequently the birth and the pregnancy were material, nay, necessary averments, and must have been in the libel if the sister country has the least accuracy of pleading; indeed, in no country could it be otherwise, for they are parcel of the *corpus delicti*. Then what does Sir Walter make his advocate "of considerable fame" forthwith proceed to do in order to save his *truly unhappy*

client? He states, that is, admits, that she had been seduced, had become pregnant, and had borne a child. Having thus admitted half the case against the poor girl, and made a trumpery speech about feelings of shame and so forth, which, addressed to the Court on the mere statutory point, could have no possible effect, he most imprudently opens evidence of the prisoner having disclosed her pregnancy to her sister; and this he does without hearing a single note of that sister's evidence, and knowing that no one had ever examined her to know what she would swear. Of course the Judge told him that this would be decisive in favour of the defence. But any one, even not a lawyer, must perceive that a more completely absurd, and indeed unjustifiable course, could not possibly have been taken than this "famous" advocate thought fit to pursue. In order to make a splash, (as they say in the "inhuman" Courts of the sister country, and as saying they scorn the vile selfish treachery, the unprincipled sacrifice of the cause to the counsel,) in order to rant away about feelings and shame, and gossip, and pregnancy, and disclosures, he begins by admitting three parts in favour of the charge, and falls back upon a witness to disprove the residue, which witness he knows absolutely nothing about. In Scotland, it is true, the prisoner's confession or statement, whatever it may be on being arrested, is read on the trial; but then the learned counsel observed that this goes for nothing, unless in so far as proof is given. If he was wrong in this, we have another blunder in law; if he was right, we have a complete condemnation of the admissions he made, unless we shall be told and it shall appear that, by the Scottish practice, a party may admit whatever he pleases by himself or his counsel, and yet not be damnified or affected by it.

The speech, described as producing a great effect, and certainly much admired by Sir Walter himself, goes on to disclose all the particulars of the poor girl's case most distinctly, interlarded, however, with a quotation as unhappy as its law and its professional skill; he speaks of the "*dulcis Amaryllidis iræ*" instead of *tristes*, and indeed an itch for classical allusion of which he was not capable was one of Sir Walter Scott's besetting sins.

He then gives the interlocutor on the relevancy, which may be correct; but we much question if it should contain a finding that the defence of the prisoner having communicated her pregnancy to her sister was also relevant, because this is, in truth, a *direct negative* to the indictment. Suppose a man indicted for murder were to say, "Not guilty, for I did not kill the man, and he is still living," would the Court ever dream of so superfluous a judgment as declaring this defence relevant? It would be merely saying, if you are not guilty, you are not guilty. Besides, how could any judgment be given upon a mere statement or speech of counsel? We have, therefore, no doubt that this, too, is quite erroneous in point of law.

But Sir Walter's capital blunder is in making the prosecutor produce and found upon a letter from the father of the child, which clearly proves not only that the pregnancy *had been disclosed to him* (which would be enough to put an end to the whole case), but also to at least one other person, a woman, and that she was hired to give that help in the delivery, the omission to provide which is a necessary part of the statutory offence. The letter runs thus: — "Dearest Effie, I have gotten the means to send to you by a woman who is well qualified to assist you in your approaching streight; she is not what I could wish her, but I cannot do better for you *in your present condition*," &c. And the King's advocate is made to prove that Effie committed herself to this woman in order to be delivered by her, thus putting himself, as we say on this side of the Tweed, at once out of Court.

Sir Walter Scott, then, need hardly say it is not his intention to describe minutely the forms of a Scottish trial, and that he is not sure of being able to draw up one that could abide the criticism of the gentlemen of the long robe. Most certainly he is right in this doubt.

After giving the evidence for the Crown, he gives that for the defence, and, singularly enough, he makes the counsel begin with witnesses to character. After this, he makes a speech on introducing the sister as a witness to negative concealment, — a speech which, of course, no Court ever could have suffered to be made, not even our Courts, before

counsel were allowed to be heard for a prisoner charged with felony. He gives the oath administered; and it turns out that he confounds the jurors' oath with the witnesses', for he makes her swear "the truth to tell, and no truth to conceal." We believe it is quite certain that this is the oath of *the jurors*, the words being added, "in so far as you are to pass on this assise;" and this has led Professor Millar and others to suppose that it indicates the remains of the defence by compurgators, and that a jury came in their place.

The counsel asks, "whether she had not remarked her sister's state of health to be altered during the latter part of the time when she had lived with Mrs. Saddletree?" a perfectly irregular question, because leading in form and in substance. But it is suffered to be put and answered without any objection. Then comes this, "and she told you the cause of it, my dear, I suppose;" a kind of address no counsel in such a cause could have made, but certainly not more a leading question than the former. However, it is objected to as such; and then Sir Walter stops to glorify his country — thus, "the Scottish lawyers regard with a sacred and scrupulous horror every question so shaped as to convey to the witness the least intimation of the nature of the answer which is desired," of which we may observe, that our Scottish neighbours must be far less acute and long-headed than we can fancy them, if any such result can follow from this "scrupulous horror." But it is strange that Sir Walter should conceive this horror to be peculiar to Scottish procedure, when he surely must have heard that it is borrowed from England, and perhaps may have heard of the utterly absurd addition tacked to it — at least in former times — namely, that the Scottish extended the rule also to cross-examination. The "horror," both on the part of the Crown lawyers and the Bench, seems in this case to have been soon got over; for after the remark above cited, we find the counsel suffered, unopposed, to put this very leading question, and at a much more critical moment, namely, after a partial denial of disclosure had been made by the witness who had said her sister told her nothing. "Nothing? True — you mean nothing at first; but when you asked her again,

Did she not tell you what ailed her?" which is not only a perfectly leading question, but a positive instruction what to answer, and how to reconcile her expected story with the one already told. Yet so pleased is the worthy author with his skilful question, that he positively pronounces this panegyric on his "famous counsel," that is on himself: "With that ready presence of mind which is as useful in civil as in military emergencies, he immediately rallied," and then the most leading question, and the most dangerous too, is put, and no objection is taken. The rest of the trial contains merely more declamatory matter on all hands, including the charge of the Judge. But we have said enough to show how strangely careless this celebrated novelist has been in giving that account of a trial which he must with a very little pains have been able to make perfectly correct.

Let any one compare the slovenly, incorrect, indeed manifestly absurd and impossible account of legal proceedings, occupying seventy pages and three chapters of the novel, with the light, graceful, and perfectly correct and entirely consistent account by our great Fielding of proceedings before magistrates, and in courts and in gaols — for instance, the first chapters of "*Amelia*," and he will at once be sensible of the mighty difference between the two writers. The one is evidently a lawyer as well as a novelist, quite at home in his subject; the other might be one of the female writers for the *Minerva* press.

Now, although we have been criticising these things as lawyers, we must observe that the courts critical would give the same judgment. No one could be more sensible than was Sir W. Scott of the paramount importance, the inestimable value of accuracy, of truth, in all the fictions of the imagination. No one felt more strongly than that sagacious person, how essential it was to follow nature closely. "*Rien n'est beau que le vrai; le vrai seul est aimable.*" Like the skilful painters, who seek for a piece of real rock, and real foliage, and real foreground, which they love to copy, he was fond of resorting where scenes of actual feeling or passion, or even guilt, were displayed, following the golden rule:—

“Respicere exemplar vitæ morumque jubebo
Doctum imitatore, et veras hinc ducere voces.”

But the learned imitator of scenes will not merely study with anxious care the productions of nature; he will resort to a real ruin, to an existing piece of wall, to columns raised by man, to architraves consecrated by the admiration of ages. So should the learned imitator of life be careful not only faithfully to render the passions and the actions of individuals, but the usages, the institutions of states, in order that his picture may have all the great charm by possessing all the vast merit of reality.

ART. IV. — THE NEW TRIBUNALS FOR RAILWAY AND OTHER PRIVATE BILLS.

1. *Report from the Select Committee on Private Bills, together with the Minutes of Evidence, Appendix and Index, 1846.*
2. *First and Second Reports from the Select Committee on Railway Acts Enactments, 1846.*
3. *An Act for constituting Commissioners of Railways, 9 & 10 Vict. c. 105.*
4. *An Act for making preliminary Inquiries in certain Cases of Applications for Local Acts, 9 & 10 Vict. c. 106.*
5. *Standing Orders of the House of Commons relative to Private Bills, as amended the 26th of August, 1846.*

THE Reports which we have placed at the head of this article, coupled with the Acts for appointing the Railway Commissioners, and for making inquiries in applications for Local Acts, prove that a very important change, or series of changes, are about to take place in the disposal of the private business of Parliament, for which our readers are not altogether unprepared.¹ They also open up views of no mean

¹ As to the general state of private business in Parliament, see 2 L. R. pp. 1. and 49. ; 3 L. R. 139. ; the necessity of taxation of parliamentary costs and of local inquiries, 3 L. R. 431. See also 4 L. R. 292—297.

importance in a constitutional light. This branch of business, so inconsiderable that it is scarcely noticed by text writers¹, has of late years become so extensive as seriously to involve the existence of all other kinds of legal proceedings. The great increase of Railways, and the interest taken by the public in these iron highways, have added much additional weight to this department of practice; but independent of these, there has been an immense number of other matters which have been drawn within the range of parliamentary interference. The Railway business has scarcely been the feather which has broken the horse's back, for it is sufficiently weighty to form an exclusive load; but probably without this, public attention would not for many years have been sufficiently called to the grievance which is now admitted by every body to be intolerable.

And yet certainly it must be admitted, that, putting all moral considerations aside, there was something exceedingly charming in certain senses of the word, in private business in Parliament, more especially as it was conducted in the sessions of 1844, 1845, and 1846. Those years will probably be long remembered as the *comet* years of the railway harvest. It may be that we are wrong in supposing that such a vintage will not again occur; it may be that, in spite of Select Committees, and new Acts, and new Railway Commissioners, we shall still see the same scenes acted over again. But as there appears some probability of those years being looked back to with fond but painful feelings as years never to return, we shall endeavour to give some faint outline of the effect they had on the profession, and to hint at some of the reasons which lighted up the eye and expanded the countenance on

¹ Blackstone, in his second volume, devotes a page to "Private Acts of Parliament," as an assurance of record; and in a work just published (Aug. 1846), "Commentaries on the Constitutional Law of England, by George Bowyer, D. C. L. 2d edition," (which shows considerable ability and industry, and which we hope hereafter to notice more particularly,) there is only a passing allusion to this part of the business of Parliament, although it treats of all other more familiar matters bordering on the subject. The occasion has called forth several special books written for the purpose, one of the best of which is Mr. Scott's "Practice of Railway and other private Bills."

the bare mention in Lincoln's Inn, or the Temple, of a Private Bill in Parliament.

Where shall we begin? A shower of gold rained down, benefiting all concerned. The Barrister, although probably never before retained in his life, found himself surprised by that most pleasing of professional ties, and this by no vulgar guinea, but by five times that sum, with a vision in the bright back-ground of days in Committee, unlimited in number, each at its close laying some ten guineas at his feet, with the additional solace of a regular evening consultation. If this was the junior's reward, how shall we paint the leader's? In what colours shall the pencil be dipped? Then, if the rewards were magnificent, the labour was far from onerous: No grinding up of intricate points; no contemptuous sneers or snubbings from the Bench; the worst to be feared was an atmosphere at the mercy of Dr. Reid, and the Bill breaking down. Equally pleasant were the labours of the Solicitor, for if he had more work he probably had also far more pay. Nor must we omit the Parliamentary Agent, who, although not we believe always, or even usually a lawyer, is far better remunerated for his most ordinary duties, than any regular member of the profession for his most toilsome or learned labours. But besides these who stand in the foreground of the group, are to be seen a happy band of supernumeraries, agents, mayors, aldermen, deans of guild, surveyors, engineers, sons and relations of each of those, all dividing some portion of the spoil, dipping their hands in the same dish, sharing the triumph and partaking the gale.

Now such being the state of the case, we cannot be surprised that this sort of business threatened entirely to engross the professional mind. What rising junior would toil at a prisoner's defence with a solitary guinea brief? Who would go on interrogating Smith's executors as to Smith's personal assets, while labours so light and so pleasant as parliamentary business were thus remunerated? The profession was fast becoming debauched: common law and equity were being forsaken. The Judges of the Queen's Bench were superseded by Group A.; and the Vice-chancellors, even Vice-

chancellor Shadwell, were pronounced "slow." In short, Westminster Hall was becoming deserted. If you called on a barrister, he was in Committee-room, No. 1. If you consulted your solicitor, he was in Committee-room, No. 2. Parliamentary business was alone attended to, alone sought after. Here the funds were large, the fees enormous, and the costs untaxed.

But all this was too good to last. Westminster Hall must be left standing; and to preserve the ancient institutions of the country, Mr. Joseph Hume (whose name is identified with economy and retrenchment) comes to the rescue. He leads forward a band of Escorcheurs, Tondeurs, and Clippers. He has already carried by assault the outworks, and another session will put the citadel in his possession, even if his flag is not flying there already.

Lest it should be supposed that we have exaggerated the evils of the present system, we shall extract from the evidence of the Private Bill Committee some instances of the enormous expense now incurred in procuring Private Bills, with the very unsatisfactory result frequently obtained thereby, and we shall also prove that the same inquiries might be much better conducted at an expense which, in comparison, seems almost ridiculous. First, let Mr. Rushton, the stipendiary magistrate of Liverpool, tell what is the state of the local law of that large borough as it now stands:—

6. Will you state what has come to your knowledge, from your experience in Liverpool, as to the nature and the operation of the acts now existing in that town?—The local laws of Liverpool are under various acts of Parliament, and under by-laws made by the municipal corporation, and by the dock trustees; the local acts are about sixty in number.

7. Are they all in operation?—Yes; some are repealed in a great measure, some more or less repealed, and others are in operation.

8. In your duty as a magistrate, have you found them differing in many respects from each other, and thereby occasioning difficulty in their execution?—Some of them differ from each other; the local acts make several large volumes altogether. As a magistrate, I have had great trouble in some instances in ascertaining what the law really was, and I think no inhabitant except a

lawyer, and no lawyer without great trouble, could in certain cases come to a knowledge of it.

47. Can you estimate at all what the expense of obtaining private acts for the borough of Liverpool has been in any number of years?—I believe I am within the mark when I say, that within the last ten years *not much less than 100,000*l.* has been expended in those matters.*

59. From your experience before committees of this House, are you able to offer any opinion as to the practicability or the advantage of having the standing orders connected with local matters proved on the spot, instead of being proved here, in London, by bringing witnesses up from a distance?—It would be a saving of an enormous expense to the country; it would be a great saving to all municipalities; it would economically execute the orders of Parliament; and I think, with the greatest deference, in a much more satisfactory way than they are now executed.

We shall next call Mr. Holland, Honorary Secretary to the Manchester Health of Towns' Association:—

161. What number of waterworks are there in Manchester?—

Mr. Holland. There is at present only one.

162. Do you know any thing as to the expense connected with that; what, according to their own statement, they have spent?—
366,800*l.*

163. Are they able to supply all the town?—They supply about one-half.

164. What is the quality of the water supplied?—*Very indifferent indeed; it is foul in taste, and it is very hard; it contains a great quantity of sulphate of lime.*

183. All these expenses ultimately fall upon the consumer?—They are added to the capital expense, *and the company charge a proportionate rate to cover it.*

We shall next cite the evidence of Mr. Chadwick, who, from his various public duties, is peculiarly competent to give a correct opinion on this subject:—

337. In the visits which you have made to different parts of the country, have you found many parishes and communities who have been in want of lighting, paving, or water, but who have been unable or unwilling to come to Parliament, in consequence of the great expense now attending it?—A great number of places. In fact, except two or three towns, and the county town, I might say

that the smaller country towns in the whole country are in that position. The expense of a water or a drainage bill, if unopposed, would be 500*l*. In the small town of St. Helen's, which required a water bill, I think the expense of the works was 3000*l*., and the expense of obtaining the permission of Parliament to erect those works was 1000*l*.; consequently, one-fourth of the money upon which the inhabitants will have to pay interest went for the Parliamentary expenses. *In fact, the expense of obtaining works for drainage of many villages, and rather important small towns, would equal the expense of laying down the house drains; and the expense of a water bill would equal the expense of laying down the tenants' water pipes.* When the standing orders require that water shall be sought by one bill, and drainage, or the means of carrying away water, by a second bill, paving or cleansing by a third bill, the fees of the House and the professional expenses of these bills mount up so as to render the expenses prohibitory; the money expended in procuring acts under which, in some of the larger towns, only ineffective and expensive works have been produced, might have sufficed to obtain good works. The money expended in Liverpool for the private act legislation, the results of which have been described to the Committee, it may be confidently asserted, would have sufficed for the effectual drainage of upwards of 20,000 houses.

Next, let us give the evidence of Mr. Elliott, the Police Magistrate:—

743. I have had occasion to ascertain in my practice at Sessions the expense with regard to obtaining local acts for the recovery of small debts. That has been brought more particularly under my notice by reason that those separate local acts provide that the expense of obtaining the Bill shall be sanctioned by the Sessions, and as a barrister practising at the Sessions, I have had applications to make to get the costs allowed of such Bills. The Committee would scarcely believe that for obtaining little local acts for establishing courts for recovering small debts, which perhaps embrace a small number of parishes, I have seen bills of 1000*l*. incurred by the attorney; *and those bills are made by the Acts charges upon the suitors' fund, and consequently a tax upon every debt that is recovered under those powers.*

744. Have the Sessions any control over the expenditure?—The chairman has said,—“What an enormous bill!” but he has always said,—“This money has been expended by the attorney, and what are we to do? he must not be out of pocket.”

And therefore I have never known any effectual check by taxation of the bill. These local bills for the recovery of small debts are got up by the attorney, whose object is to be appointed the Clerk under the Act, which is probably worth 100*l.* to 200*l.* a year. He gets the consent of the parishes; he expends the money out of his own pocket and gets the office, and then gets paid back out of the suitors' fund all the expenses, the first money received being charged in that way.

Probably our readers will think that we have sufficiently proved this part of our case. But we cannot resist giving the evidence on this point of Captain Washington, R. N., one of the Tidal Harbour Commissioners:—

789. Have you been able to form any opinion as to the manner in which Acts of Parliament for the improvement of docks, harbours, &c. have been prepared and carried out?—Yes. I have found in the mode of obtaining those acts something which appears to me very objectionable and radically wrong, inasmuch as I find that nearly every Harbour Act is contested by some party or other, and the consequence is, that in most harbours a very large debt has at once been incurred, in some cases exceeding the whole income of the harbour, to enable them to get an Act to empower them to improve the harbour. I may mention the case of Belfast, where in 1837 the cost was 6972*l.*, merely to obtain an Act for the improvement of the harbour, in consequence of opposition, all of which might have been settled by three disinterested persons going to the spot. In the Belfast Act of 1841, another contest for an amended bill cost them 3200*l.*, so that in the course of seven years the harbour paid 10,186*l.* simply for harbour acts.

790. Do you consider that a satisfactory arbitration or settlement could have been made, if parties deputed by the admiralty, or by other proper authorities, had been sent there for that purpose?—Certainly, I conceive so, except in the cases of private property, which most probably would have been referred to a jury; and that could all have been settled, taking it for granted that people are tolerably reasonable. I have instanced Belfast; but it is the same with Drogheda, with Wexford, with Aberdeen, with Alloa, and with Glasgow, and to a very great extent at Hull. I have it in evidence, that the contesting dock bills has cost the town of Hull 50,000*l.* within the last fifty years. At Warkworth, in a single year, it cost them 4444*l.* to get a harbour act, simply from opposition by a party.

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another celebrated bill, in which the "one halfpennyworth of bread" stands in the same contrast to the other items in the account.

The Committee were somewhat puzzled by these charges; and, first, they call Mr. Walmisley, who was the parliamentary agent employed on this occasion, and they ask him these questions in allusion to this bill:—

1195. What is the solicitation fee?—There is allowed by the scale of charges a solicitation fee of twenty-five guineas.

1196. Is the same charge made for all kinds of bills, or does it vary according to whether they are first, second, or third class bills?—It is the same unless there is considerable trouble; and then, of course, one charges more.

The agent then charges this fee over and above all his other charges. But so it seems, also, does the solicitor. Mr. Tinley, the solicitor employed, on being examined, is asked,—

1256. The Committee observe here a charge for soliciting the bill through both Houses of 30*l*. Is not that charge usually included in the parliamentary agent's bill?—It is always made in the parliamentary agent's bill; but in my parliamentary practice, which is considerable, I have invariably charged it, and never had it objected to: it is my own fee to cover an infinitude of small charges, which it is impossible for a man to put in his bill.

In a former question, Mr. Tinley is asked,—

1250. It appears that Mr. Forsyth has been paid the sum of 30*l*. for going to London. Who is he?—Mr. Forsyth and Mr. John Dryden were two of the Committee appointed to aid me in getting the bill.

1251. Members of the Commission?—Members of the Commission.

1252. Is the sum of 30*l*. paid to each of them for their expenses, or for their time?—For their expenses entirely.

1254. At what rate were they paid?—I just gave them 30*l*. without any calculation as to how long they might have been in town.

But not only do Mr. Forsyth and Mr. John Dryden get 30*l*. thus easily, but it seems that the Commissioners, on passing the Act, resolve on a little bit of gratuitous patriotism:—

1265. There is also dated the 16th of June, to which you sign as clerk of the Commissioners, a vote of 379*l.* 16*s.* 6*d.* towards erecting a memorial to the late Lord Collingwood, with a beacon in connection therewith. Is there any clause in the bill authorising them to apply a portion of the Coal Turn Act dues to that purpose? — I think not.

Now we are not blaming any one for all this expenditure. It is the system that is to blame, and not any individual; and Mr. Tinley wishes, as all other respectable solicitors would wish, to have a proper taxation of parliamentary costs instituted.

1257. Looking at the aggregate amount of this account, 1985*l.*, has it been subjected to any examination by any officer belonging to this House? — No.

1258. Is there any mode by which your accounts for such business are ever checked? — I do not know.

1259. Is there any rule amongst solicitors generally by which their charges in parliamentary proceedings are regulated, or does each person charge as he pleases? — There is none. I believe they are as indefinite as can be. I understand that there are many Scotch writers who are charging this session 7*l.* 7*s.* a day, and their expenses.

1261. Would it not be very desirable that gentlemen in your situation should have some rule by which they should be able to know at what rate they are to be allowed, in order to prevent dissatisfaction with respect to the expenses attendant upon bills? — I think so, decidedly. I can say it would have saved me a great deal of pain, mortification, and anxiety. I think that an officer, appointed by the speaker, or any competent tribunal to whom a bill should be submitted, would at once take away the possibility of blame.

But the evidence of Mr. Burke, the eminent Parliamentary agent, and of Mr. Creed, the experienced Committee clerk, enables us to account for a good portion of this vast expenditure. The money does not go even into professional pockets, which to us would be some consolation; it is spent in keeping witnesses in town often to their great inconvenience, and is frequently thus idly, uselessly, and unprofitably thrown away.

954. Can you state the greatest number of witnesses you have ever known to be called to prove the compliance with the standing

orders upon a bill?—*Mr. Burke.* I am not prepared to give an answer, but I think I recollect one bill in which there were 400.

1284. Do you recollect how long, in any cases, you have known them (the witnesses) wait for their turn?—*Mr. Creed.* I could hardly state how long, but I know for a very considerable time. I might safely say, three weeks or a month, parties have been waiting on the list till their turn came, with a great number of witnesses in attendance, many of whom they are obliged to keep in town, from the uncertainty as to whether their case may not come on at any moment.

On this point of expense we may also give an extract from the Second Report on Railway Act Enactments, p. 19. :—

“The Eastern Counties Railway, which is fifty-one miles in length, cost £45,190 in Parliamentary expenses. The Parliamentary expenses of the London and Birmingham has been stated at £650 per mile ; of the Great Western at £1000 per mile.” “*Mr. Peto* mentions one instance within his own knowledge, where, though the line was utterly impracticable, and the bill never went beyond the Standing Orders Committee of the House of Commons, the solicitor’s account, which did not include the expenses of engineers, and various other outlays, amounted to no less a sum than £82,000.”

It may be supposed that, after all this enormous expense is incurred, the result is satisfactory — that the public interests are regarded and protected, and that the object to be attained is gained in the best manner. But there is abundant evidence, as we shall now proceed to show, that there is, in almost all cases, no one present to protect the public ; that these undertakings are started and carried through for some private gain or end ; that the opposition to them is suggested and directed, either from the same motives, or not unfrequently from jealousy, pique, rivalry, or pure love of job, from a thousand bad motives, and rarely from one good one ; and that all that the public has to do in the matter is generally to pay enormously for a service, or for an article which might have been much better performed or obtained for one hundredth part of the price paid.

The fact is, that the getting up of these bills was, and may still be, unless care be taken, a mere matter of trade, carried on by the Parliamentary agents and attorneys, and others

concerned. It might be supposed, that some particular locality desired a small debt court, or another water company, one being already established. But this was not so. The rule was, that where one water company could exist there was room for another. But the starting these others frequently made the water supplied dearer to the community supposed to be benefited. For the old company, of course, opposed the new company, and the public had to pay the expense thus incurred, which we have seen was usually enormous; or the opposition was compromised on some private bargain being made favourable to the companies, but injurious to the public. So a young attorney in a small town, finding his business slack, started a small debts' court, advanced the necessary expense, had himself appointed clerk, and thus got his money back again by a charge on the suitors.

But let us now come to the remedy which is to be applied to this grievance, and surely so rotten a system as that which we have been describing must fall to pieces on being exposed to the light; and fortunately the same physicians who describe so faithfully the disease all agree in the prescriptions for its cure, and we think they make out a triumphant case for a trial of their remedy; and here, as before, we can only make a selection of what appear to us to be the most important opinions, there being many others to the same effect.

We will first quote Mr. Chadwick's evidence as to this:—

324. You think that no bills should be passed until there has been a local examination, and a report by a properly qualified officer to ascertain whether the water is of proper quality, and whether the source is amply sufficient before any expenses are incurred?—*Mr. Chadwick.* Certainly; I think it is equally important for the protection of the capitalist, and for the protection of the public.

325. What are the advantages which you expect from referring applications for bills to a public department, and having a local examination?—In the first place, a great mass of important information would be obtained cheaply, such as is now not obtained at all, and as could not be obtained except at enormous expense. I have always found, in the course of my experience, that by local examination I get a great deal more than I can sitting in London. An unexpected case occurs, which one has an opportunity of settling at once upon the spot; parties who object to leave their busi-

ness, and, who may be able to give the best evidence, have no difficulty in coming, if the inquiry is on the spot. I inquired of a private solicitor yesterday, with relation to one bill now in progress, which has cost above 5000*l.*; and he tells me that, if they had had a local examination by any competent officer, he would have been able to have executed for hundreds what the parties have already expended thousands for; and if the attendance incurs little trouble, you call only those witnesses who are wanted, and as they are wanted. *At present an attorney, not knowing what may be wanted, or when, has in attendance from day to day, at great expense, a number of witnesses, none of whom are called.* There is also the expense of private parties who attend to canvass members of the House.

326. You mean that it might have been settled by arbitration upon the spot in the presence of a public officer, and all the expenses saved? — Yes — not merely those questions which it might be necessary to settle by arbitration, but ordinary questions of testimony. In the next place, Parliament, or the Committees of Parliament, would have known and responsible, instead of unknown and irresponsible, parties to look to; for all the waste, and worse than waste, in the local works already sanctioned, who is now responsible? — Besides a known and responsible informant, Parliament, or a committee in the case of reference to a department, would have the responsible department itself. In the case, however, of such references as are now made to departments, it may be said that there are not the proper means of responsibility. In the case of reference to the Board of Trade, for instance, the department has only the means of judging upon such facts as are brought before it, namely, the representation of parties bringing forward the measure, or the representations of parties opposing it, who may have little to do with the public at large in the particular district. As to the interests of the important third party, the public, they had no opportunity of knowing what was going on or attending to it, whereas a public officer making an examination on the spot would be able to see the works, and to see the things to which the plans relate, and would be able to give very important information to the locality, as well as to receive it.

340. How would you enable communities to take the benefit of these powers without incurring the expense of coming to Parliament? — By a petition, which need not, in the first instance, be presented to Parliament, but to a public department; and the department should be authorised to send down a person to examine the place, and the proposed works; for, however small the place

may be, I know of no circumstances in which that security of previous local inquiry by a competent and impartial person ought to be omitted. Even for the permission to drain private estates, I believe that it would be beneficial, and the expense of sending down a competent officer for two or three days, to make a report upon the spot, would be comparatively inconsiderable, and it would be beneficial to the parties ; it would save them from many blunders as to the works, and it would give securities for the protection of reversioners and absentees, and the prevention of waste.

Let us next give the evidence of Mr. Greene, M. P., the present Chairman of Committees.

367. Have you considered whether the proving of the standing orders of the House might be done in the presence of proper officers deputed for the purpose, on the spot, so as to save expense and prevent delay and inconvenience to the members of the House ? — I think a good deal might be done upon the spot ; but I am not quite certain whether there would be so very great a saving of expense, because the parties themselves would be obliged, of course, to pay the expense of the commissioners attending for that purpose. A vast number of the witnesses upon many of those bills are really persons who are resident in London, surveyors, and engineers, and parties who are not brought from the country. I think that a great saving might be effected, if, prior to the session of Parliament, all these matters were referred to some one individual,—some officer of the House,—who should examine into the fact, whether the standing orders had or had not been complied with. When a petition for a Bill is presented to the House there should be a certificate of the officer that the standing orders had or had not been complied with : if they had not been complied with, it might then be referred to the Committee on Standing Orders to say whether they should be dispensed with. An enormous saving would occur in this manner, because the ten days' notice, which is necessary for parties to go before the Committee upon Petitions, would be altogether saved, and they might proceed at once with their Bills upon the meeting of the House. I am satisfied that the whole might be done in a very short space of time, because an officer of the House, sitting, as he would, during a month before the meeting of Parliament, from perhaps ten o'clock till five or six, would get through an enormous mass of business ; whereas at the present moment you have to wait the assembling of the Committee ; then the Committee is broken up by the Speaker taking the chair ; and the meeting and

breaking up lose so much time, that I am satisfied the whole would be done easily by one man sitting a greater number of hours in each day. There would also be the further advantage of saving the time of forty-five of the most efficient members of the House, who are now employed in ascertaining these matters, and who might then be usefully employed in working upon Committees on Bills.

369, 370. Supposing the plan were adopted of sending down an individual on behalf of the public from some department of Government, to make previous inquiry and examination, do not you think that he might inquire both as to the merits of the measure sought for, and as to compliance with the standing orders?—No doubt he might do so. I think it of the greatest importance that all private legislation should, if I may say so, emanate from some department of Government, which should appear on behalf of the public.

We may next extract the opinion of Mr. J. S. Lefevre, the joint Secretary of the Board of Trade:—

707. I confess that I very much approve of local inquiries on the spot; I think that there are many points which might be settled amicably in that way, which now cannot be settled at all, owing to the great expense that results to any person from attempting to oppose a private bill.

708. In what way should those inquiries on the spot be made; should it be in public, that access may be had to all parties interested?—Certainly.

709. Do you think that public notice should be given whenever a commissioner is sent down from the department to inquire upon any particular subject?—Yes.

Lastly, We must quote the opinions of Mr. Strutt, M. P. (now the President of the new Railway Board), Mr. Estcourt, M. P., and Captain Jones, M. P., which point to an entire abandonment of the present mode of proving the Standing Orders, and we need not say that on this subject no higher authority can be cited than that of these gentlemen.

1393. Have you considered how far it might save the time of the members of the House, and perhaps promote uniformity, if the standing orders were proved either before properly constituted officers, deputed to inquire on the spot, or by an officer appointed

by the House?—*Mr. Strutt*. I certainly think that there might be a great saving of time to Members, and that, too, to some very efficient members of the House, whose time might be employed to much greater public advantage; and I also think there would be a very great saving of expense to the parties, if some public officer was deputed to go down to the spot in question, and take all the formal evidence in proof of standing orders.

1399. Do you concur generally with *Mr. Strutt* as to the possibility of having the standing orders proved out of the House, before a proper officer so appointed?—*Mr. Estcourt*. So far as I have been able to inquire into the subject, I should say *Mr. Strutt's* observations are perfectly correct.

1400. Do you concur in the evidence given by *Mr. Strutt* as regards the proof of the standing orders?—*Captain Jones*. I do, entirely.

Thus we conceive a clear road is made for a great alteration, if not an entire abandonment, of the present mode of proceeding in private Bills before Committees in Parliament, and the substitution of local inquiry under the superintendence of some public department. Against this large body of important evidence, we have only to place the somewhat conflicting opinions of some parliamentary agents, who, we must be permitted to think, are not entirely disinterested in the matter. All these gentlemen, it is to be observed, bear testimony in favour of the recent Consolidation Clauses Acts; but some of them entertain doubts as to an examination on the spot by the officer of a department. *Mr. A. Graham*, who is examined at the greatest length as to this, says (927.) that he does not think it would do; that "the decision would not meet with the respect or command the confidence of the public." But surely, after the evidence that has been given, the decisions of the present committees can neither deserve nor receive respect or confidence. He next says, —

928. The value of such information would depend upon the manner in which it was gained; and I do not think that information gained *ex parte* ought to be of any value in Parliament at all. I presume that the officer of the department whom it is proposed to send down would obtain information *ex parte*.

929. It is proposed that he should have the parties before him and hear them?—Then my opinion is, that it is quite impracticable. You would have a little parliament with its staff sitting in every town.

930. *Viscount Ebrington*. Is not it frequently the case under the present system, that two competing parties appear before Parliament with their respective witnesses; but that the public, and the public interest, are not represented at all?—*It is so very often.*

This, we think, disposes of the *ex parte* objection. But the best answer to Mr. Graham, perhaps, is that the plan of local investigation has been tried in the instance of the Inclosure and Tidal Harbour Commissions, and has met with complete success. Some of the proposed investigations may be more difficult and tedious, and may turn out more expensive, but that a much more satisfactory inquiry may be instituted, and a great saving may be made in expense and time in many cases, is placed beyond contradiction, as the evidence to which we now refer shows that this new system has been, in two instances, for some time in operation with complete success, both as to the benefit obtained, and the small cost of obtaining it. The first witness to this point is Captain Washington, R. N., the Tidal Harbour Commissioner, who thus adverted to a case that occurred under that commission.

815. Can you state what the expense of the visit of those two commissioners will be?—We examined Colchester and Ipswich. Two cases were referred to us; the examination of Colchester and the Colne river, then on to Ipswich, and the examination of the Orwell river, and to return to London, one examining officer having been brought up from Cornwall; and the whole expense of obtaining the report was 30*l.*; because the officer of engineers had to be paid for his time. Had he been a public officer employed by the government, he would not have been paid for his time. The other officer was a public officer, and was simply paid his travelling expenses, which were about 5*l.*; whereas the Parliamentary contest must have cost more than 1000*l.*

The other witness is Mr. Blamire, the Inclosure Commissioner, who thus speaks as to the working of that commission.

1088. Does the person sent by you receive all the objections

which are made to the enclosure, or in what way do you collect the objections?—The assistant commissioner hears and investigates all objections made upon the spot. Parties occasionally object by letter, prior to the meeting, or subsequently to the meeting.

1091. What class of persons have you employed to make those inquiries?—Different parties; legal men for the investigation of cases involving legal difficulties, and experienced surveyors and practical country gentlemen for the investigation of cases not involving such difficulties.

1092. Do you find any difficulty in obtaining well-qualified persons?—Not the least; we have numbers of applications continually made for employment.

1098. What time is taken up by those commissioners, generally, in making inquiry on the spot?—Generally one day for simple cases, two days for cases more complex; and there are, and must be, cases involving considerable difficulties, where the investigation must necessarily be more protracted.

1099. What may be the amount of expense, on the average, attending each of those eighty cases which you have settled?—Under 20*l*. We at first had some easy and simple cases, the expenses of which were, upon the average, about 16*l*.; subsequently we have had cases requiring more protracted investigation, the expenses of which have swelled the average, so that the average is now something under 20*l*.

1100. Does that include advertising, and paying for the room, and printing?—Every thing.

It was not then surprising that, when this body of evidence was obtained, that the Committee should be slow in reporting in favour of the change suggested, or that Parliament should be slow in acting on the Report.

The Committee, in their report, remark, that “under the present system the expenses of obtaining the most necessary or desirable private bill are grievously and needlessly heavy, while the great mass of these so called private bills (excluding those which are in their nature personal, such as divorce and estate bills) materially affect public interests, and are, although local, essentially public bills. That with respect to these local bills, the chief imperfection of the present system of legislation arises from the fact that no provision is made for furnishing the committees which sit upon them with complete and trustworthy information, either with regard to the local evils requiring remedies, or with regard to the bear-

ing which the provisions proposed in them may have upon the general law of the country. * * Your Committee would further remark, that it appears, by reference to the index of the statutes, that in the period which elapsed from the union with Ireland to the termination of the last session of parliament, nearly 9,200 local and personal bills passed into law, and only 5,300 public statutes; but to the pressure of private business, especially during the two last sessions, they prefer appealing to the experience of members of the House rather than to the statements of witnesses on the statistics of parliamentary returns." The Committee then make the following recommendations: —

1. *Public General Acts.*

"Your Committee are of opinion, that it is desirable, in cases in which only ordinary powers are sought, that means should be afforded to the parties of carrying their projects into execution, under the authority and supervision of one of the public boards or department, *without the necessity of applying to parliament.*

"That for this purpose public general Acts should be passed on the several subjects of *sewage and waterworks, paving, lighting, police and watching, markets, and EVERY OTHER CLASS OF PRIVATE BILLS, excluding those which are in their nature personal*, on a principle similar to that which has been already carried into effect by the 3 & 4 W. 4. c. 90. for lighting in England; by the 9 Geo. 4. c. 82. for lighting, &c. in Ireland; and by the 3 & 4 W. 4. c. 46. for police in Scotland.

"That every such public general act should set forth the conditions on which any corporation, parish, company, or other parties may be invested with the powers conferred by such general act, and should also specify the public board or department of the government under whose authority such powers are to be conferred; such boards and departments being the Home Office, the Board of Trade, the Admiralty, the Commissioners of Woods and Forests, the Inclosure Commissioners, or others, as the case may be. That amongst the provisions so to be specified in each public general act, the following seem to be expedient; namely,

"That a memorial, for authority to put in force the powers of the act, be presented to the proper board or department. That such memorial shall state the objects of the promoters; the public utility of the measure; the local situation of the work; the esti-

mated expense; the means by which the necessary funds are to be raised, and the periods over which the charges or repayments are to be distributed.

"That within a limited time, similar information on these points shall be given to all parties interested, and to the neighbourhood, in the manner required by the standing orders in the case of private bills; and that a printed copy of such memorial, together with plans and sections, estimates, subscription contracts, and all other appropriate information, shall, in a similar manner, be lodged at the office of some local functionary, and that duplicate copies of the same documents be likewise lodged with the department at the same time.

"That all parties interested shall be permitted, within a given time, to lodge, for public inspection, in the office of the local functionary, written suggestions, objections, or amendments to the measure proposed, which shall in due time be forwarded to the department.

"That the department shall thereupon depute one or more qualified inspectors (at the expense of the promoters) to proceed to the locality, and there, after due notice, —

"1st. To inquire in open court whether the provisions of the Public General Act as to notices, deposit of documents, and all other legal requirements, have been duly complied with.

"2ndly. To inquire as to the merits of the case, both by evidence in open court, and by personal inspection, and then to make a written report on both points to the department.

"That the department, exercising its discretion on both the above points, shall thereupon determine whether authority shall be given for the exercise of the powers of the act, and if so, upon what terms and conditions, and that such authority be conferred by a legal document, according to a form to be appended to the act: but that in any case in which private property may appear to the department to be seriously interfered with, such authority shall be withheld, and the parties be left to the ordinary mode of proceeding by application to Parliament."

2. Private Bills.

"That, in the opinion of this Committee, it would be desirable that similar proceedings should be adopted in the case of *all private bills relating to the above-mentioned classes of subjects*, by requiring, —

"That all applications for such bills should, previously to the session of parliament, be referred to the proper board or department as above, and

“That such department should appoint one or more inspectors to proceed to the spot to take evidence both as to compliance with the standing orders, and upon the merits of the measure, in the manner above recommended, and to make a separate report upon each of these points, such reports to be referred respectively to the Committee on Standing Orders, and to the Committee on the Bill. If, as would be most desirable, the House of Lords should think proper to adopt a similar course of proceeding, the same inspectors might report to both Houses.

“That, with the view of an immediate saving of time and expense in the proofs of the standing orders, the Committee recommend that in the ensuing session of Parliament, the proof of standing orders now taken before the sub-committees shall be taken before an officer, or officers, to be appointed by the Speaker, who shall commence his sittings for this purpose on the 1st of January, 1847; that every petition for a bill, with a copy of the bill annexed, shall be lodged in the Private Bill Office on or before the 24th of December, and that no bill be permitted to be read a first time until the report of such officer shall have been presented to the House; and further, that to facilitate this object, all plans, &c., shall be deposited, and all applications shall be made to landowners and occupiers on or before the 30th of November. It has been suggested that the officers above mentioned might hold their sittings in other places besides London.”

3. Taxation of Costs.

“That although the fees payable to Parliament on local and private bills are fixed and known, yet the charges of solicitors and agents for promoting or opposing such bills are very uncertain, and often very extravagant; and, as there is no scale established by Parliament for such charges, it is desirable, for the protection of the public, that a proper taxing officer, such as is attached to courts of justice, should be appointed under the authority of the Speaker, and a scale of taxation be authorised and published by him for the guidance of all parties promoting or opposing local and private bills.

“That the taxing-officer shall present to the House, at the commencement of each session, an account of the total amount of the expenses for promoting or opposing of each bill taxed and sanctioned by him during the preceding session, distinguishing the amount paid as fees on each bill to each of the Houses of Parliament, the amount for witnesses and other expenses, and for professional services.”

This report has been partially carried out by the Act 9 & 10 Vict. c. 106., by which (s. 1.) it is enacted, that in any case where it is intended to make an application to parliament for an act for the establishment of *any waterworks, or for draining, paving, cleansing, lighting, or otherwise improving any town, district, or place, or for making, maintaining, or altering any burial-ground or cemetery, or for continuing, altering, or enlarging any of the powers or provisions contained in any act or acts relating to any of the purposes aforesaid*, a notice in writing of such intention to apply to Parliament in the next ensuing session for an act for any of the above objects shall, *on or before the last day of November* in each year, be sent or delivered to the office of Woods and Forests, accompanied by a statement of the intended object of the proposed act, with such plans, &c. as are required by the standing orders of either House of Parliament; and (by s. 2.) the Commissioners of Woods and Forests, on being satisfied with the security for payment of the expenses, may appoint one or more person or persons of competent skill to be a surveying officer or officers for that purpose, who (s. 3.) shall give notice of the proposed inquiry; and (s. 4.) have power to summon witnesses and administer oaths, which powers are enforced by a penalty. (s. 5.) The expenses of the inquiry are to be paid by the promoters of the undertaking, and are to be certified by the certificate of the surveying officer. (s. 6.)

The standing orders have also been revised in accordance with the suggestion of the Report, and the Speaker is authorised to appoint one or more officers, to be called, "The Examiners of Petitions for Private Bills," one of whom shall be appointed chief examiner. The examination of petitions for private bills is to commence on the 15th of January, and the compliance with the standing orders is to be proved before the Examiner.

We understand that the Speaker has already appointed two of the new officers of the House, who will exercise the important duties of "Examiners of Petitions." Mr. Samuel Smith and Mr. T. Erskine May have been appointed.¹ We have also

¹ Should not these officers be intrusted with the power of adjudicating on the proof of the standing orders? As it is, if they consider that the compliance with these orders has not been proved, they must still report this fact to the

been informed that Sir George Grey, as Secretary for the Home Department, has written a letter to the proper officers, requesting that the new Bills mentioned in the Report should be prepared, and that such Bills are in the course of preparation.

This important *revolution* in the private business of Parliament has therefore commenced, and we cannot doubt that it will proceed. Its success in the first instance will mainly depend on the persons who are employed by the Woods and Forests to carry out the preliminary inquiries. But if they be well selected we have no fear that the result will be unsatisfactory. The important recommendation of the Report of the *taxation of Parliamentary costs* will not, we trust, be neglected.

But this is not the only report or the only act relating to the private business of Parliament which passed last session. Our readers will remember how earnestly we have contended for the creation of some new tribunal for the disposal and superintendence of the Railway business.¹ We are exceedingly glad, therefore, that, in pursuance of the recommendations of the Committees of both Houses to which we have recently adverted², “An act for constituting Commissioners of Railways” has been passed. This is confessedly only a preliminary step: the details of the measure are still to be worked out. The day on which the Commissioners shall begin to act in execution of the act, shall be published in the London Gazette (S. 1.), and that publication at the time at which this is written, has not been made. The Commissioners, with the exception of the President, have not as yet been appointed. We shall not therefore enter into any criticism of the act. We will only express our pleasure that the step has been taken, provided that the new tribunal is endowed with sufficient power, and so constituted as to command the

Standing Orders Committee, who will sometimes have to decide without a sufficient representation of the facts before them.

¹ See more especially 3 L. R. No. 5. Art. x., p. 139.; No. 6. Art. xiii. p. 415.; and No. 8., p. 273.

² No. 8., p. 273.

necessary respect. The opinions which we have ventured to express as to the incompetency of the present committees of the House of Commons to deal with railways, we find fully borne out in the Reports of the Select Committee on Railway Acts Enactments, in which not only the establishment of a distinct department of the executive Government is recommended, but in the second Report it is said (p. 16.), that "such a Board, if properly constituted, might relieve committees of the House from much waste of time, and companies applying for lines, as well as the public at large, from much needless trouble and expense. The example of foreign countries has shown that many inquiries with regard to railways can best be conducted on the spot. But, besides the advantage from substituting a cheap and natural mode of conducting inquiries for the present cumbrous and most expensive mode before committees,—under which too, they are entirely dependent for information on interested parties,—the public might hope that a properly qualified Board, entrusted with railway affairs, would obtain more knowledge of the wants of the country, and of the best means of supplying them, than committees under the present system can possibly possess." Unless, then, the new tribunal is prepared, sooner or later, to undertake the duties now performed by committees, but little good will be done. For a complete exposure of the present vicious system as to railways, we need only refer to the Report which we have last cited. But it touches on matters with which we have no direct concern. Our business with these reports and acts is only to state the alterations which they make in the present mode of dealing with the rights of property and of administering justice.

While we view with satisfaction these changes which we have long considered indispensable, we hope that the improvement of the existing committees will still be carried on. Although much business will be taken from them, much will still remain. The alterations made as to Committees and Railway Bills have evidently been an improvement; and it is difficult to see why a road or a canal bill should be dealt with in one fashion and a railway in another.¹ We are glad

¹ See 2 L. R. 59., where this part of the subject is fully entered into.

therefore to find that Mr. Ewart has given notice that he will move next session "that Committees on all private bills consist of five members, neither personally nor indirectly concerned in the question submitted to their consideration."

ART. V.—FRAUDS UNDER THE BANKRUPTCY LAWS.¹

MR. WARBURTON'S BILL TO RESTORE ARREST.

1. *A Bill to restore Arrest on Mesne Process in civil Actions under certain Limitations.* Printed by the House of Commons, 27th August, 1846.
2. *Return of the Number of Town and Country Fiats issued from January 1838 to January 1839.* Ordered to be printed 22d July, 1839.

FEW people are aware how much is annually lost by bad debts. We will endeavour to enlighten them. Our materials for calculation are these:—1. The actual results of the working of the London Court of Bankruptcy for the year 1836, as made out by the official assignees of the court;—2. Parliamentary returns, showing what proportion London and country bankruptcies bore to each other about that time;—and, 3. An account, communicated to us by a very considerable house, established within a quarter of a mile of the Mansion House, of the number and amount of bad debts made by it in carrying on its business, and how they were dealt with. It is convenient to give the house a fictitious name, and, as the account is made up from books, kept with extraordinary accuracy, we think we cannot do better than call them Messrs. Accurate and Co. The account is as follows:—

¹ On the general subject of this Article, we would refer to a work by Mr. J. H. Elliott, "Credit the Life of Commerce," 1845, published by Madden and Co. We wish it to be understood that we do not give an implicit adherence to all the propositions in this article.—ED.

Year.	Mode of administering Estate.	Residence of Debtor.	Number of Debtors.	Amount of Debts.	Amount realised.	Rate per £.	Sales in the Year.
					£ s. d.	s. d.	£
1837	Composition Assignment Bankruptcy	United Kingdom	30	2144	1023 0	9 6½	161,224
			24	1064	363 0	6 10	
			21	908	207 0	4 6½	
1838	Composition Assignment Bankruptcy	Ditto	12	836	458 0	10 11½	219,911
			16	737	267 0	7 2½	
			25	841	148 0	3 6½	
1840	Composition Assignment Bankruptcy	Ditto	40	5512	3334 0	12 1	302,075
			24	1734	750 0	8 8	
			54	4626	1255 0	*5 5	
1841	Composition Assignment Bankruptcy	Ditto	37	3815	2815 0	12 1½	309,250
			36	1732	637 0	7 4½	
			51	3398	498 0	2 5	
1842	Composition	England and Wales	33	1709	963 0	11 3	340,342
		Scotland	6	437	260 0	11 11	
		Ireland	3	111	34 0	6 1	
	Assignment	England and Wales	32	1405	538 0	7 8	
		Scotland	2	99	42 0	8 6	
		Ireland	3	532	122 0	4 7	
	Bankruptcy	England and Wales	35	1312	265 0	4 1	
		Scotland	4	354	133 0	7 6	
		Ireland	2	38	2 10	1 4	
	Insolvency	England and Wales	9	503	Nihil	Nihil	
1843	Composition	England and Wales	46	3520	2209 0	12 6½	380,532
		Scotland	2	305	148 0	9 8	
		Ireland	9	849	566 0	13 4	
	Assignment	England and Wales	32	2036	822 0	8 1	
		Scotland	3	108	35 0	6 6	
		Ireland	5	461	220 0	9 6½	
	Bankruptcy	England and Wales	29	1895	437 0	4 7½	
		Scotland	2	9	—	—	
		Ireland	2	50	—	—	

* The average dividends upon bankruptcies in 1840 is greatly increased from the following circumstance: A debtor for 500*l.* was a shareholder in one of the mis-managed joint-stock banking companies; to relieve himself from his liability, and protect his separate creditors, he allowed our solicitors to issue a fiat, under which he paid nearly 20*s.* per pound to his separate creditors. If the 500*l.* be deducted from the amount of debts and produce under the head of bankrupt, the average dividend would be only 3*s.* 8*d.* in the pound.

We use the above materials thus. The accounts made out by the official assignees shew that the total amount due from London bankrupts for the year 1836 was 2,324,023*l.*, and that the total amount of sums distributed amongst their creditors of all classes was 251,889*l.*; the difference therefore, 2,072,134*l.*, was the loss sustained in that year by creditors through bankruptcy, as administered in London. Parliamentary returns for the year 1836 and the two or three preceding and succeeding years show, that the London bankruptcies at that time were about one third of the whole number for England and Wales; if so, the total loss by bankruptcy throughout England and Wales might be computed at three times the above amount, that is, at 6,216,402*l.* But, besides bankruptcy, there are three other methods, by which creditors and debtors arrange their affairs, as shown by the paper of Messrs. Accurate and Co., viz. composition, assignment, and insolvency; and another, not shown, but notorious enough, namely, flight by the debtor, and a total abandonment of all hope by the creditor; and another, even more common, setting the creditor at defiance without any flight by the debtor, but a simple reliance on the expensiveness and inefficiency of the law. According to the statement of Messrs. Accurate and Co., their loss by bankruptcy in England and Wales in the year 1842 was about one-third of their whole loss in that year through bad debts; that is, they lost

	£.		£.		£.
By Bankruptcy	1312 less	265 recovered	—	difference	1047
By Composition	1709 less	963 recovered	—	difference	746
By Assignment	1405 less	538 recovered	—	difference	867
By Insolvency	503 less	0 recovered	—	difference	503
	3617 less	1501 recovered	—	difference	2116
	1501				
	2116				

Now 2116*l.* is more than twice as much as 1047; we may, therefore, calculate that, on the average, the losses of all persons by compositions, assignments, and insolvencies, is twice as much as that by bankruptcy, and then, if we multiply the loss by bankruptcy by three, we shall have an approach to the total loss of England and Wales by bank-

ruptcies, compositions, assignments, and insolvencies, year by year. Now the loss by bankruptcy as above shown, was 6,216,402*l.*; that sum, multiplied by three, gives 18,649,206*l.*; and, if to that we add one-third more for Scotland, Ireland, &c., and for those cases, wherein the debtor does not compound or assign his property, and does not become either bankrupt or insolvent, but simply runs away, or stays where he is, and relies on the probability that his creditor will be too wise to waste his money on a law which pretends to help, but only laughs at him, we shall have, as the total annual loss by bad debts,

	£18,649,206
Plus one-third	6,216,402
Total	<u>24,865,608</u>

in round numbers, twenty-five millions of money; being more than the whole expense of the army, navy, and civil government of England put together, and amounting to almost half as much as the whole of our exports.

This seems a startling conclusion! Let us, then, test its correctness in another way. It appears by the account above referred to, that Messrs. Accurate and Co. made sales in the year 1842 amounting to 340,342*l.*; that they had 129 debtors, who failed to keep their engagements; that their original loss was 6500*l.*, of which they got back 2359*l.*, and that, therefore, their ultimate loss in that year was 4141*l.* Now, we will assume, that their net profits, divisible amongst the partners, were in the same year 10,000*l.* Upon that the income tax at seven-pence in the pound, would be 290*l.* 13*s.* According to these figures, the burden of bad debts was to them fourteen times as heavy a burden as that of the income tax; for 4141*l.* is more than fourteen times 290*l.* 13*s.* To the whole country, the burden of the income tax is — say — 5,100,000*l.* a-year; and fourteen times 5,100,000*l.* is 74,000,000 and upwards, not 25,000,000*l.*; and hence we cannot but think, that our calculation, that the loss by bad debts is not less than 25,000,000*l.* a-year, is not an exaggerated one.

Are there no means, by which this prodigious loss can be

diminished? We think there are; and that those means are just and fair and considerate legislation; legislation, not such as is only too common, *class* legislation, but legislation founded on an enlightened view of what is for the benefit of the whole community. But is there much hope of this? Alas! we fear not. Unfortunately the influential classes, those who form the legislating body in this country, and those with whom the legislating body associate, and from whom, therefore, they take their tone and opinions, are not the sufferers by bad debts; indeed, they hardly know the meaning of the words; and the calculation we have just made with regard to the income-tax proves this. For, if we were to assume that all classes suffered equally by bad debts, then the total loss by bad debts would be 71,400,000*l.* a year, whereas it probably does not exceed 25,000,000*l.* It is therefore evident that some classes do not suffer by bad debts at all, except indirectly in the increased price of the commodities they buy. Now, which are the classes who do not suffer? obviously the upper classes. And this conclusion is fortified by common experience. Ask any gentleman, any person not in business, what his annual loss is by bad debts. He will laugh in your face; or, if he condescends to answer, he will say he loses nothing, or next to nothing. We ourselves are extremely soft-hearted and foolish, and have often committed the folly of lending money, sometimes to a friend, sometimes to a poor neighbour, and have seldom seen much of it again; and yet if we were asked what our annual loss was by bad debts, whether it was fourteen times the amount of our income-tax, we should infallibly laugh in the inquirer's face, and perhaps ask him whether he had taken leave of his senses. It is evident, then, that this loss, whatever it is, whether 25,000,000*l.*, or more or less, does not fall on what may be called the influential classes, and is therefore not an element much considered in legislation. If any person interested in the matter doubts this, let him try the feelings of our legislators in this way; let him write a paper on debtor and creditor, and take it round to such members of parliament as he may happen to know, one by one, and before delivering it, let him ask each whether he takes any interest in the subject, and would like

to read the paper, he will certainly, in nineteen cases out of twenty, receive a very discouraging answer. "I must confess I know little, and care little about the subject." But let him take a paper about the law of landlord and tenant, the mode of recovering rents, the best means of repressing poaching, the corn law, the poor law, or in short on any subject interesting to the upper classes, and his paper will be received; and, if worthy of a perusal, will probably be read. It is this circumstance, the lamentable indifference of our legislators to every thing that does not concern themselves and the classes with whom they associate, that is so disheartening to the reformer, who feels the injustice to which the *middling and lower* classes have been subjected by the successive relaxations which have taken place in the law of debtor and creditor. He feels, that in addressing the legislature, he has to deal with a large and inert mass; that the whole of that mass is steeped in indifference; that his case is hopeless, unless he can make them understand a subject which they won't even try to understand, which they care nothing about; and, what is worse is, he knows that even if he should succeed in convincing those that take the lead in parliament, that the subject is of importance and ought to be considered, the duty of considering it will be shifted from parliament itself to some delegated authority, and that that delegated authority will most probably consist of a majority of persons who are imbued with all the prejudices and all the indifference of parliament itself; that it will consist of bankers and merchants who suffer but little by bad debts, and scarcely ever resorted to arrest when arrest was permitted; and of barristers or bankruptcy or insolvency commissioners, who never give credit, and never lend money, except as an act of kindness, and then to such amount only as they can well afford to lose.

In 1840, Lord Cottingham, when Chancellor, was satisfied that some remedy was required for the existing evils; and, under his advice, a royal commission of inquiry issued, addressed to five lawyers, five eminent merchants and bankers, and one gentleman, not in any business or profession; and what was the result? It was that all the Commissioners but

one concurred in recommending that that remedy which experience had shown and all the evidence proved, was the only remedy, the *fear* of which practically produced the payment of debts, namely, *seizure of the person*, in other words imprisonment for debt, should be utterly and entirely abolished. They sanctioned indeed the notion, that, if the creditor could show that his debtor was about to abscond, he should have the power of arresting him ; but what mockery was this ? What induced a man to abscond ? Why surely the dread of having his person seized. When the dread of having his person seized was gone, what probability was there that a debtor would abscond ? Instead of absconding, he would go to his creditor, and say " You can't seize me *now* ; you can't throw me into gaol now ; I am not going to abscond, why should I ? now that you can't seize one's body for debt, England is as good a place for an insolvent to live in as any I know. Its a paradise for debtors. I have no thought of quitting it." And he might even hold this language whilst he was selling off all his property by auction, and in reality preparing for his departure. He might boldly attend the auction ; face all his creditors ; desire them to do their worst, for that he was only turning his property into money under his own inspection, that it might be sold advantageously, and enable him to pay a better dividend ; and then, when by holding such language as this he had deprived them of all pretence for obtaining a judge's order for arrest, he might put the money in his pocket, go by railway to London, and from thence proceed to Dover, Brighton, Southampton, Bristol, Liverpool, Hull, or any other port of embarkation, and escape far beyond the reach of the tardy and lingering process of the law.

Is it thus that lawyers would provide for the recovery of their fees ? landlords for the recovery of their rents ? Surely not : the gentlemen of the profession have an infallible means of compelling payment of their just dues ; they are a very small body, in constant communication with each other, and, if a solicitor retains one of them and does not pay the usual fee, it is soon noised abroad among the rest ; and no member of the Bar would thenceforth hold a brief, or in any way

act for such solicitor. The best remedy the law could devise, would not be so effectual as this. It is not from barristers or judges, therefore, that sympathy for a creditor can be expected. They are not losers by bad debts.

And how does the landlord, the member of the legislative body, take care of himself? How does he enforce the payment of his business debts, his rents? By a remedy, of which, if you can say that it is tyrannical and oppressive, you certainly cannot say that it is not most stringent and most effectual. It is called *distress*. Blackstone's account of it is to be found in a chapter¹, the very title of which is curious, — "Of the redress of private wrongs by the mere act of the parties."

"A fifth case," says he (p. 6.), "in which the law allows a man to be *his own avenger*, or to minister redress to *himself*, is that of distraining cattle or goods for nonpayment of rent," and this is "intended for the benefit of *landlords*, to prevent tenants from secreting or withdrawing their effects to his prejudice." Afterwards (p. 7.), he says, "We may lay it down as an universal principle, that a distress may be taken for any kind of *rent* in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it."

Is not this equally true of all debts? is it not even a greater injury to detain a debt from a merchant, or tradesman, of whom payment to the very day, on his own liabilities, is required, and whose credit, which is his life, may therefore be ruined by his debtor's unpunctuality? And how is this distress made? Hear Blackstone again (p. 11.),

"When a person intends to make a distress, he must by himself, or his bailiff, enter on the demised premises."

So that the landlord is his own judge, issuer, and executor of his own process. He makes no affidavit of debt; he applies to no court; he asks for no authority, but simply of his own will and pleasure, and on his own responsibility, enters and seizes. And what does he seize? the property of his debtor? Hear Blackstone again (p. 8.),

"Whatever goods and chattels the landlord finds upon the pre-

¹ 3 Com. Bk. c. 1.

mises, whether they in fact belong to the tenant *or a stranger*, are distrainable by him for rent."

So that the trick, so effectually practised as to the common creditor, that of transferring the property by bill of sale, falls harmless on the landlord. But suppose that the tenant removes the goods from off the premises, will not this defeat the landlord? Hear Blackstone again (p. 11.), and see whether a legislature of landlords will permit themselves to be easily foiled.

"If the landlord does not find sufficient distress on the premises, formerly he could resort to nowhere else, and therefore tenants who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords; but, now, *by statute* (landlords are our statute makers) the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them, within thirty days after, unless they have been *bonâ fide* sold for a valuable consideration, and all persons privy to, or assisting in such fraudulent conveyance, forfeit double the value to the landlord."

Is not this an excellent specimen of what we have above characterised as *class* legislation? Well may a legislature of landlords, thus armed at all points as regards the only debts due to them as matters of business, debts for rent, turn a deaf ear to the distresses of ordinary creditors. "Let the galled jade wince, *our* withers are unwrung." Well can they afford to play into the hands of spendthrifts of their own class, to call creditors "duns," and debtors "poor fellows," and legislate in conformity to the prejudices indicated by such phrases.

But is this right? is it honourable to take such extraordinary care of themselves, and to show such indifference to the interests of others? It is said that the law is no respecter of persons; but can this be said with truth, when the law is so astute in protecting landlords, so careless in protecting the middling and lower classes? Look at the position of an ordinary wholesale dealer. He sells a parcel of goods on credit to the retail dealer, and takes a bill of exchange, payable on a day certain. On the due payment of this bill he relies to enable him to pay the manufacturer who supplied

him. The bill of exchange is not paid. He makes inquiries, and finds that his debtor is selling his goods over the counter to ordinary customers under prime cost, is sending away large parcels by carrier in a manner quite inconsistent with the business of a retail trader, and he learns other facts which convince him, as a man of business, that his debtor is about to cheat his creditors. He goes to his solicitor, and this conversation passes: — *Client*. What can I do? *Solicitor*. — Nothing! At least, nothing effectual. *Client*. — Cannot I arrest my debtor? *Solicitor*. — No! The cry, for many years before 1838, was that arrest was unjust and cruel; and in 1838, the legislature abolished it, unless there was evidence that the debtor was about to abscond; and debtors don't abscond *now*; they don't run away now; because there is nothing for them to run away from; they used to run away from arrest, but now there is no arrest for them to run away from; so that they stay where they are. *Client*. — Had I not better, then, bring an action against him? *Solicitor*. — I don't think it will do you much good. As soon as you bring your action, your debtor will get some friend to sue him: he will defend your action; he will make no defence to his friend's action. His friend will get judgment and execution first; and, when the sheriff goes in under your execution, he will find an officer in possession under another execution, and will be obliged to retire; and you will only be so much the more out of pocket. By bringing an action, you will only be throwing good money after bad. *Client*. — Can I not then make him a bankrupt? he is a trader. *Solicitor*. — No, you cannot; for you cannot make a man bankrupt without proving an act of bankruptcy; and since the abolition of arrest, you cannot *force* a man to commit an act of bankruptcy. Whilst the law of arrest continued, you could; because then you could obtain the writ of *capias*, and the debtor ran away to avoid being arrested, or would not come out of his house at all for fear he should be arrested; and either running away, or shutting himself up in his house, was an act of bankruptcy; you issued your fiat, and got a fair inquiry, and a fair distribution of your debtor's property. But that cannot be done now, since arrest has been abolished. *Client*. — But I thought that a new act of

bankruptcy was introduced to replace those which had been abolished by the abolition of arrest. *Solicitor.* — It is true that a new one was introduced by a law of 1842, but it is quite useless against a knave, for all that a knave has to do to defeat the process is to swear that he believes he has a good defence to *part* of your demand, and the whole process falls to the ground, and you pay the costs. *Client.* — Am I then wholly remediless? *Solicitor.* — I fear you are, and as long as the law remains as it is, my advice to you must be, if your debtor offers you five shillings in the pound, take it; if he offers you one shilling, or one penny, take it; and if nothing, leave him alone, and rejoice that his next victim will be some one else. There is, however, one thing you can do, agitate for an improvement of the law. Go to all traders like yourself, and tell them what I have told you; tell them that the matter is one in which every honest man is deeply interested; tell them that creditors are an *outlawed* class; that the number of debtors preying on the community is daily increasing; and that if imprisonment for debt be wholly abolished, as has been proposed, not one debtor in a thousand will ever suffer even a day's imprisonment; and ask them to reflect, what must be the consequence of such universal impunity to cheating. With due exertion creditors may be again brought within the pale of the law. It is true, you are not favourites with the legislating classes; when you sue one of them, they call you "a dun;" and if you put a debtor in one of their prisons, they think you occupy a space which might be much better tenanted by a poacher. Do not, however, despair. You are strong in the justice of your cause, and may find a powerful advocate in *The Times*, which in a leading article of the 18th of June last, said: — *The experiment of abolishing arrest on mesne process, and leaving creditors to the conscientious consideration of their debtors, were based on sentimentality.*"

It may be said, what are the remedies for which creditors should agitate? We answer,

1. To procure the abolition of all process against goods or property, except in Bankruptcy.
2. To restore arrest on mesne process, guarding it carefully against abuse.

3. To extend the Law of Bankruptcy to the whole community, instead of confining it to traders and certain other classes specially described.

We will illustrate each of these propositions by showing the existing evils, and the mode by which the adoption of the remedy we propose, would remedy those evils.

1. ABOLISH ALL PROCESS AGAINST GOODS OR OTHER PROPERTY, EXCEPT IN BANKRUPTCY.

The reason for this proposal is, that process against goods, by what the law calls a *feri facias*, is nothing more than an instrument of fraud. Its practical effect, in nineteen cases out of twenty, is not to give the debtor's goods to his real creditor, but to *protect* them *from* his real creditor, and to enable the debtor to enjoy them himself under the pretence that they are no longer his, but have been seized by a creditor, too often a sham one, who is very kindly allowing him to use them, either from pure friendship, or, what looks rather more plausible, on the terms of paying rent for them. This is the plan if the goods consist of furniture. If they consist of stock, then the representation is varied. In that case the goods are being sold over the counter in the usual course of business *for the creditor who has seized*, and the debtor is only acting as *agent* for sale, and accounting for the proceeds to the execution creditor. Of course, this is a cheat, transparent enough to be seen through by the eye of common sense; but, transparent as it is, it is extremely doubtful how far the law will see through it. Justice is painted by the poets as blind, and on an occasion of this sort she fully justifies the poet's idea, for she is uncommonly blind; and as she is also exceedingly rapacious in what she charges for any little services she may render, a creditor does not much like to employ her. He thinks it quite enough to have been robbed once by a sharp-sighted enemy, without undergoing a second squeezing by his blind friend, and so the knavery constantly passes unchallenged, to the infinite improvement of commercial morality.

Such is the evil in nineteen cases out of twenty. In the

twentieth case it is different ; in that case it consists, not of knavery, but of simple injustice, for it consists in this, that the property seized is seized for the benefit of one creditor only, whereas the exigences of justice require that, if seized at all, it should be seized for the benefit, not of one exclusively, but of all proportionately. And it is accompanied by this further evil, that the property seized is commonly sold in a very hurried and wasteful manner, the creditor caring nothing how wastefully, so long as there is enough to pay the necessary expenses and his debt. He cares nothing for the rest of the ship's crew, so long as he can save himself in the cock-boat of his own fortunes. And in this selfishness he is justified by the law, which by its maxim — "*Vigilantibus et non dormientibus inservit lex,*" furnishes an excuse for any degree of selfishness.

There is, in fact, no case in which seizure of *goods* for the benefit of *one creditor* only can be the right course. Either the debtor is solvent or insolvent. If *solvent*, if he is able to pay, pressure upon the *person* is the wisest course, as regards the creditor and the debtor. It is best for the creditor, because it is the least *hazardous* course. In proceeding against the person, the creditor can make no mistake. He knows his debtor's eyes, his nose, his mouth. He is sure to seize the right man. On this point, to use one of those phrases which have fallen from the Great Duke, and which, like himself, seem destined to immortality, "There is no mistake, there can be no mistake, and there shall be no mistake," whereas if you put the creditor to seize the debtor's goods, the process is really and practically nothing but a Comedy of Errors; a comedy, that is, to the debtor, for it is too often a tragedy to the creditor, being an error which involves him in a lawsuit with some claimant of the goods seized. Nor is such process harsh towards the debtor, for if he can pay, and will not, surely there is no great hardship in pressing upon his person.

If the debtor be *insolvent*, if he really cannot pay, it is clearly his duty to declare himself insolvent, and meet his creditors fairly. If he will not do this, surely he has no ground of complaint if the law assume for a time that he can pay and *will not*; and inflict on him as much imprisonment

as will suffice to enable it to deduce the true conclusion, namely, that he really cannot pay. We propose, of course, that if he lie in prison a certain time without paying or giving bail, he shall be subject to the laws of insolvency.

But it may be said, that the case may be one neither of unwillingness to pay, nor of permanent inability, but a case of inability merely temporary. We admit that it may, but even in that case also pressure on the *person* is far better even for the debtor than the seizure of goods. It is better for many reasons, for first it is less expensive; it is a simple process, and a simple process is always less expensive than a complicated one; secondly, it is less notorious, because the arrested debtor is taken to a distant court, so that nothing need be known at the place where he carries on his business, except that he is not there; whereas, if a servant of the law is sent to take possession of the debtor's goods, there is an immediate notoriety on the spot; thirdly, seizure of the person brings the parties so much the sooner face to face; and a face-to-face meeting is the surest means of bringing litigants speedily to a right understanding. In any case, therefore, whether it be that the debtor can pay, and will not, or that he cannot pay then, but can after a time, or that he cannot pay at all, the pressure on the person is the best means, both for the debtor and creditor, of bringing about a speedy and satisfactory settlement. In the first case the debt will be paid; in the second, fair explanations will be given, and reasonable arrangements may be made with or without the intervention of the court; in the third case, the debtor will acknowledge himself insolvent, or be proved to be so by lying in prison three weeks without giving bail; he will be released either immediately, or at the end of the three weeks, his property will be taken under the authority of the law, and instead of being handed over, at the will of the debtor, to favoured creditors, or taken by one to the injury of the rest, it will be realized with the least possible loss, at the least possible expense, and fairly distributed.

It may be said, why seize the person at all? Why not use the non-payment or the not giving security within the three weeks as a test of insolvency, and treat the debtor as an insolvent? We answer, that if the debtor is *honest* and sol-

vent, the seizure of his person is useful as forcing on his mind a sense of the seriousness of his position. It is an excellent warning. There can be no mistake about his having had full notice. If he is, as is too often the case, *dishonest*, his being in prison will prevent mischief.

2. RESTORE ARREST ON MESNE PROCESS, GUARDING IT CAREFULLY AGAINST ABUSE.

What! the reader will perhaps exclaim, restore arrest on mesne process, restore the greatest abuse known to the law! the monster abuse, that has ceased to exist under the withering influence of public indignation! Yes! we boldly answer, yes. Arrest fell a victim to public indignation, it is true, but not to calm reasoning. It was brought to an untimely end, not after a full and temperate investigation, but by a sort of Lynch law, after a trial where passion and clamour alone prevailed. Nor was the indignation against it unjust or unfounded. The old law of arrest had every fault a bad law could have; it was put in action, not on the discretion of the judge, but on the responsibility and at the pleasure of the antagonist party; it subjected the debtor, who was really unable to pay, to imprisonment which might be interminable, and that, in a prison, where riot, drunkenness, debauchery, filth, extortion, and every other horror prevailed; and it left the debtor, who could pay, in the enjoyment of his property, that he might purchase indulgence of sheriffs' officers, gaolers, and turnkeys. But these were the *abuses*, not the *uses*, of the law. The abuses have for the most part ceased to exist. Public indignation has subsided, and the time is now come when the *uses* of the law of arrest may be restored.

We should have been glad to have here enumerated all the abuses, which, under the old law, tainted the law of arrest and imprisonment for debt, and shown, one by one, what was the proper remedy for each abuse; but our limits will not permit us. We must attempt this on some future occasion; and, in the mean while, content ourselves with adverting to two of the greatest abuses, — 1. arrest *without proper inquiry*, and, 2. imprisonment, notwithstanding the debtor was *willing*

to acknowledge his insolvency, meet his creditors fairly, and cede his property for distribution.

As to the first of these abuses, arrest without proper inquiry, we fully admit it to have been a very gross abuse. Our indignation against it is as warm as that of the most eager abolitionist; but what was the proper remedy? To abolish arrest altogether? No. But to provide that arrest should not take place, *without proper inquiry* before a court of justice, and on the order of a court of justice only. Why was there no proper inquiry under the old system? Why did the arrest take place, as of course, upon tossing an affidavit of debt into one office, and procuring a writ of *capias* to be tossed to you out of another, with no discretion exercised? The judges have told us. Because, said they in *Emerson v. Hawkins*¹, "it may be inconvenient to the debtor, yet there would be ten times more inconvenience if we were to try whether plaintiff swears true." The plain English of which was, as we stated in a former number, that it would occupy less time to do injustice *without inquiry*, than to do justice *after inquiry*. At that time there were but twelve judges, and their time was too fully occupied to admit of their exercising discretion in each case; so they said, on this material question, a question affecting personal liberty, "No judicial discretion shall be exercised at all. All shall depend on the discretion, or rather forbearance of the creditor."

But we have now fifteen judges, and what is of more importance, we have eighteen useful courts established, to arrange the affairs of debtors and creditors, six in the year 1831, and twelve more in 1842. We have now, therefore, an ample force to exercise judicial discretion in these cases. There are six courts sitting in London, and twelve more sitting in the great hives of industry in the country; all with ample time to hear and consider, and all perfectly competent to deal with such questions; for the very essence of their jurisdiction is to decide on questions of debt. Why then should not *they* be entrusted with the exercise of this discretion? See how the law has vacillated — how it has rushed from one extreme to another. Formerly it said to the creditor, "Only make your affidavit, and take to prison whom you like.

¹ Wils. Rep. 335.

We trust all to your forbearance." Now, it says, "You shan't take any one to prison till after judgment. Let your case be ever so clear, even if you have the debtor's handwriting to prove the case against him; or, if you have got, not only his hand, but his seal, his bond, still you shall have no immediate redress; you must give him plenty of notice and plenty of time to withdraw himself and his property out of your reach. Our former system, arrest without inquiry, did injustice. Our new system, no arrest at all, may do equal or still greater injustice. We care not." But after such violent swaying from one side to another, may we not hope that the balance may subside into the *middle position*, the position suggested by right reason, ARREST PRECEDED BY PROPER INQUIRY.

Interim relief, early relief, precautionary relief, upon a case of *high probability*, as contradistinguished from that ultimate relief which is founded on *legal certainty*, attained by trial and judgment after hearing both parties, is granted by all Courts acting on rational principles. Observe what is done under the criminal law and in chancery. Under the criminal law you do not say the mere affidavit of the prosecutor that the alleged criminal is guilty, shall send him to prison *without inquiry*, nor do you say that under no circumstances shall he go to prison till after trial and judgment. You rush into neither the one extreme nor the other. You have preliminary inquiry before a coroner, a magistrate, or some proper authority; and, if on the whole there appears a fair *primâ facie* case of probable guilt, you do not allow, what the *Times* very justly calls "sentimentality," to prevent your sending the untried man to prison to abide his trial. In chancery, a plaintiff asks for an injunction or other precautionary relief. You do not say, establish your case by pleading to issue and obtaining a decree, and *then* we will grant you the injunction; nor do you say, on the other hand, the plaintiff has sworn positively—that is enough. "It may be inconvenient to defendant to have the injunction issue, but there would be ten times more inconvenience if we were to try whether plaintiff swears true." You do not rush into either the one extreme or the other; you *do* inquire "whether plaintiff swears true;" you say to the plaintiff,

show a sufficient *primâ facie* case, and, if necessary, we will grant the injunction at once, with liberty to the defendant to move to dissolve it, or you take the less strong step of desiring the plaintiff to give notice to the defendant, and you then hear and decide, not conclusively, but by way of precaution, on hearing the statements on both sides. Why should not the analogy, furnished by the criminal law and by chancery, be adopted in the matter of arrest? Why should not the creditor attend before a proper judge, and show a sufficient *primâ facie* case of debt due, producing his written documents, his books, and papers, to fortify his statement; and, on satisfying the judge, either have a *summons* for the debtor to appear, or, on showing a probable case of contemplated fraud, have a *warrant of arrest*, a *capias ad respondendum*, in the first instance. To this plan we cannot see any objection. A case has lately occurred of great injustice, even under the existing law, though arrest has been in substance abolished; the case of Monsieur Ouvrard, a French gentleman of great celebrity. M. Ouvrard had employed a person to survey a house for him. The surveyor made an extravagant charge for his services, a charge of 1000*l*. M. Ouvrard refused to pay it, upon which the surveyor made an affidavit, swearing that M. Ouvrard owed him the 1000*l*., and then, availing himself of the fact of M. Ouvrard being a foreigner, to raise, with other circumstances, a *primâ facie* case of probability that he was going to leave England, obtained an order for his arrest, and M. Ouvrard was kept in custody for seven or eight days. In reality, M. Ouvrard neither owed the money, nor had he any thought of quitting England. He had been staying on a visit at the Duke of Beaufort's, in Gloucestershire, and was on his way to pay a visit to the Earl of Lonsdale, in Cumberland, when he was taken. It is difficult to conceive a greater injustice, but such an injustice could not have taken place under the system which we are advocating; because, the moment the surveyor had stated his case to the tribunal, the judge would have said, "Your case is not one of those in which the law will sanction an arrest in the first instance; you say that M. Ouvrard owes you 1000*l*., but your demand is not founded upon an express contract; it is

founded upon your own estimate of your own services; if there is a difference of opinion between you and M. Ouvrard as to the value of your services, you must submit that question to a jury. We cannot interfere till a jury has decided it. Arrests are not to take place except in *clear* cases; and yours is a case of arbitrary valuation of his own services by the party interested, and therefore not a clear case, such as to justify an arrest in the first instance.

We have lately had the great pleasure of seeing that a highly respected member of the House of Commons, a gentleman who has ever been an eager opponent of the abuses of the law of arrest, has had the courage to bring in a Bill to restore the law of arrest on *mesne* process with proper guards against abuse. We sincerely hope that the Bill may be carried in the next session of Parliament. We extract the following account of it from the *Times* of Friday, the 18th of September last: —

“A bill (which was yesterday printed) was laid on the table of the House of Commons at the close of the late session, and ordered to be printed for consideration during the recess, to restore arrest on *mesne* process in civil actions under certain limitations. The bill was prepared and brought in by Mr. Warburton and Mr. Leader, according to the customary indorsement in such matters; and by the preamble it is declared that ‘it has been found, by experience, that the abolition of arrest on *mesne* process has greatly increased the expense and difficulty of compelling the payment of debts, and has enabled debtors to continue to resist their creditors until the greater part of their assets has been wasted or concealed, or distributed amongst favoured creditors, and it is expedient to restore the power of arrest on *mesne* process in civil actions, with proper precautions to prevent such power from being abused.’ The evils pointed out by the preamble do exist, and there has been of late a growing disposition among men conversant with the law of debtor and creditor that the power of arrest in certain cases should be restored, to prevent the waste of property obtained by debtors, and to teach them there is such a thing as punishment for their misconduct. By this measure it is proposed that no arrest should take place except by order of the Court of Bankruptcy; that no commissioner is to issue an order unless the creditor first swears fully to the particulars of his demand, nor unless there is a

primâ facie case of debt due, and of two applications having been made for the same. On the debtor being taken on a writ of *capias*, he is to be brought immediately before the commissioner, with liberty to show cause against the arrest, and the commissioner may either discharge the party or order him to find bail. The party arrested may be discharged on the payment of money into court, or on filing a declaration of insolvency, or a petition as an insolvent debtor. The suggestions will probably be considered by the Lord Chancellor, who has promised to give his attention to the law of bankruptcy and insolvency." — *Times*, Friday, 18th September, 1846.

As to the second great abuse, namely, that under the law of arrest persons were often imprisoned who were really unable to pay their debts in full, and were quite ready, either to pay such composition as their assets would enable them to pay, or to cede every thing to the proper Court for distribution, we admit this also to have been a very great abuse; but what was the remedy? the abolition of arrest? no; but the enabling the debtor to avoid the evil of arrest by placing himself and his property at the disposition of his creditors, himself for personal examination, his property for equal distribution. To abolish arrest was to yield to the force of the argument, and adopt a conclusion far beyond what the force of the argument required. To abolish arrest was to remove that very motive which induced the debtor to meet his creditors fairly. Why was he willing to meet their views, and do them all the justice in his power? Because, if he did not, each creditor might seize his person.

Our Reformers, most illogically, fancied they could exempt the debtor from the pressure on the person, and yet have the benefit of that willingness to yield, which the existence of the pressure produced. Admitting then the force of this argument, we protest against the conclusion deduced from it. We say, you should have retained the power of arrest, but enabled the debtor at any moment to avoid it, or exempt himself from it by a declaration of insolvency, which, whilst exempting him from the pressure of *one* creditor, should have placed himself and his property within the jurisdiction of that Court, whose function it is to act for and protect *all*. Had

this course been pursued, there would have been no ground of complaint. The creditor would have had the means of pressing the debtor, and the debtor the means of escaping all pressure by the simple act of telling truth by merely saying, "I am unable to meet my engagements." The reasonableness of enabling the debtor thus to protect himself was so apparent, and so irresistible the argument in favour of debtors being permitted to originate the proceedings against themselves, as indeed American debtors can, that in 1842 and 1844 the Legislature passed acts enabling debtors to do so. If this had been done at first, arrest probably would not have been abolished, for then the answer to the abolitionists would have been,—"Can your friend, for whom you are so interested, pay the debt?" "No, he cannot!" "Then why does he not sign a declaration of insolvency and avoid being arrested?" Unfortunately, abolition of arrest came in 1838, and it was not till 1842 and 1844 that the justice to debtors of allowing them to declare themselves insolvent and obtain protection, arrived. Now that it has arrived, arrest should be restored. The error of abolition should be corrected; and we hail Mr. Warburton's bill as the means of effecting it.

3. "EXTEND THE BANKRUPTCY LAW TO ALL CLASSES, INSTEAD OF CONFINING IT TO TRADERS, AND SOME OTHERS SPECIFICALLY MENTIONED."

The reasonableness of this is self-evident. Why are traders and certain other specified classes to be subjected to a law, to which the classes *above them* are not subject? Is there any injustice in the law of bankruptcy? If there is, why are traders subjected to it? If there is none, why are the higher classes *not* to be subjected to that law? What are the main principles upon which the bankruptcy law is based? Are they not these? That if a man cannot or will not pay his debts, his property shall be seized into the hands of the law, his creditors shall be summoned to meet and prove their debts, and choose guardians of their interests; and that then, under the superintendence of those guardians, the property shall be realised in the most beneficial way, and the proceeds shall be distributed amongst the

creditors, proportionably to their respective demands; and that, incidentally to the administration, a proper inquiry shall take place into the conduct of the debtor; and if it appear that his insolvency was the result of misfortune, he shall be restored to the pursuits of industry, with an entire exemption from past obligations; but if it appear that his insolvency was the result of conduct more or less blameable, he shall be treated accordingly. Are not these the true principles on which the Law of Insolvency ought to be based? and, if they are, why is not the insolvency of the upper classes to be dealt with under the law of bankruptcy? We are at a loss to conceive what answer can be given to this question, unless, indeed, it be this; that the very same principle which entitles the landlord, in his character of creditor, to the remedy of "distress," oppressive as we have above shown that remedy to be, entitles him, and the classes intimately connected with him, in their character of debtors, to refuse to be subjected to the law of bankruptcy, the principle **THAT MIGHT MAKES RIGHT**. The upper classes may say, "we are the legislating *class*; we insist on *class* legislation; and we are resolved, that as, on the one hand, we have a most effective remedy against our debtors, so, on the other, shall our creditors *not* have an effective remedy against us." But is this safe?

We cannot believe that such injustice can prevail much longer. The present Lord Chancellor has in several sessions proposed bills for the purpose of subjecting all classes to the law of bankruptcy, under the name of "adjudicated debtors;" and we have sufficient confidence in his honesty and perseverance in any opinion, once adopted by him on mature consideration, to feel sure that he will not fail to support it with all the authority of his great office. And when the claims of justice are supported by authority, they must prevail.

We must now conclude. Mutual confidence, it should never be forgotten, is the source of mutual help. Unless we can trust each other, we dare not help each other. That the wise and the provident should in the long run have the advantage over the foolish and improvident, if it be an evil, is an evil inseparable from the moral government of the

world. To us it appears but one of the innumerable proofs of the existence of a Supreme Intelligence, for from that it results that, in a time of famine, there are always some who are able, *and willing too, if the law does not step in to check their willingness*, to rescue their heedless fellow-creatures from the extremities of starvation. In the *Times* of Wednesday, October the 7th, 1846, we read in a letter of the *Times*' Commissioner, dated Isle of Skye, "The same witness informs me, that he has sold 1500 bushels of meal to the people this year, 1200 of which have been sold to them ON CREDIT."

ART. VI. — THE ORIGIN OF THE COMMON LAW.

AMONG Lord Bacon's legal aphorisms, there is one, which, until recent times, was (with a few splendid exceptions) neglected in this country, "*Præter corpus ipsum juris*," (says his Lordship), *juvabit etiam antiquitates legum invisere.*"¹ But Lord Bacon's was a *vox clamantis in deserto*. He, in most things, was a mere Direction Post, pointing out the road which should be followed, but taking no step towards it himself. In saying, however, that the antiquities of law should be studied, he delivered a most judicious precept; for law is not a *pure* but a mixed science; it consists not of abstract truths alone; but its philosophy is so closely interwoven with its history, that errors in the one must inevitably lead to defects in the other. And if any part of our law deserves to have its antiquities explored, surely it is the *Common Law*, the root and soil, as it were, from which all the rest has sprung, the most ancient part of our jurisprudence, and that which affords rules and maxims, for the interpretation of statutes, and the guidance of Courts.

Now, there are three theories respecting the origin of the common law of England; first, that it is beyond all research; secondly, that we can trace it to the original inspirations of

¹ Augm. Sci. Aph. 86.

certain Anglo Saxon monarchs, such as Alfred, Ina, or Ethelbert; and, thirdly, that as well these sovereigns, as the Britons who preceded, and the Normans who followed them, drew the main part of their legislative wisdom from a much earlier source, the Roman jurisprudence. Let us examine these several propositions.

Sir MATTHEW HALE, in his "History of the Common Law of England," lays it down, that there is a "moral impossibility of giving any satisfactory, or so much as probable conjecture touching the original laws" (of England), for the reasons which he there sets forth. Now, Sir Matthew Hale (notwithstanding the malicious and envious sneers of Roger North) was an admirable judge, and an upright, honourable, good man; *but he was no antiquarian*. This was partly his fault; for he might have profited, more than he did, by the learning of Selden, Spelman, Prynne, and others; and partly his misfortune, because more abundant stores of antiquarian lore than even they possessed, have, since his time, been laid open to the legal world. The reasons, too, on which he grounds his opinion, are either futile in themselves, or in a great degree inapplicable at the present day. He says, that we have "no authentic records of any acts of parliament before the 9th of Henry III.," and "no regular series of reports of judicial decisions before the reign of Edward I.;" that we have "no clear and certain monuments of the original foundation of the kingdom of England;" that "the kingdom has had many and great vicissitudes of people that inhabited it, whence arose a great mixture and variety of laws;" that "the intercourse and traffic with other nations gradually made a communication and transmigration of laws from us to them, and from them to us," &c.; all which statements merely amount to this, that profound research is always difficult, and that accurate information was in his time scanty. The research, however, would certainly have been rendered more effectual by perseverance; and the information has become much fuller at the present day. And when the very excellent Chief Justice concludes by asserting that the knowledge, if acquired, would be of no moment or use, we need only reply, in the words of a philosophic antiquarian, "Law is

only a science when observed in its spirit and history. Government cannot be comprehended, but by attending to the minute steps of its rise and progression; and the system of manners, which characterise men in all the periods of society, from rudeness to civility, cannot be displayed without the discrimination of these different situations.”¹

Among the great sticklers for an exclusive Saxon title to our legislation, was my Lord Coke; and of him we may say (though with more qualified praise), as we did of Sir Matthew Hale, he was a great practical lawyer, *but he was no anti-quarian*. Witness the tenacity with which he clung to the *Modus tenendi parliamentum*, as a genuine Saxon document, even after Prynne had demonstratively proved that the very word “parliamentum,” as signifying a legislative body, was unknown till long after the Norman Conquest. Witness, too, his phrase, “The King’s Ecclesiastical Law,” which he would have had us believe was as old as the English monarchy, though it certainly was never heard of till the twenty-fourth of Henry VIII. But the most whimsical of all claims to a Saxon origin is that of Nicholson, to which Blackstone very gravely gives credit, that trial by jury was instituted by that “great legislator and captain,” Woden!!² The fact is, that national vanity, a weakness scarcely more pardonable than personal vanity, for a long time persuaded our sages that it would be degrading to Englishmen, descendants of a Saxon race, to suppose that their ancestors had not an original talent for legislation, and more particularly to admit that they could have been taught any thing by foreigners, such as Tribonian, Ulpian, or Papinian. Hence it was that most of our lawyers, from the fifteenth century downwards, affected a contempt of the Roman law, of which they were wholly ignorant, and which, in all other parts of Europe, was acknowledged to be, as in truth it is, the main basis of all civilised legislation.

We come then to the third theory, namely, that the common law of England derives its origin, in very great part, from the Roman Jurisprudence. And here we recur with

¹ G. Stuart. View of Society.

² Black. Comm. iii. 349.

great pleasure to Mr. SPENCE's profoundly learned treatise on the *Equitable Jurisdiction of the Court of Chancery*, of which in our last Number we took a brief notice; for an adequate review of so comprehensive and erudite a work would have far exceeded the limits, which we could then, or can now, allot to such an undertaking: and indeed we shall at present confine our remarks to the first book of his first part, which treats of "the laws and institutions of Britain under the Romans, Anglo-Saxons, and Danes."

It is but of late, that our lawyers have begun to call to mind the historical fact mentioned by the learned Selden, that for about *three hundred and sixty years* the greater part of this island was a Roman province, governed by Roman authorities, subjected to Roman laws, and these administered by Roman lawyers, in tribunals fashioned on Roman models. That the celebrated Papinian indeed presided in the forum of York, or that Ulpian and Paulus exercised the functions of assessors in the tribunals of Roman Britain, though deemed probable by such high authorities as Selden and Mr. Spence, we have ventured, with all due deference, to doubt; but we never doubted that the Roman governors, from the time that Britain became a province, dispensed justice there according to the Roman forms; for first, it was the especial duty of every *Præses Provinciæ* so to do; and secondly, we are told by Tacitus, that Agricola, so early as A. D. 80, attended the *conventus* and *judicia* in Britain.¹

Having mentioned Papinian, Ulpian, and Paulus, it may not be amiss to notice their respective rank and standing in the Roman Forum; from whence some notion may be formed of the probability of Selden's conjectures. Out of the 8676 fragments which compose the Digest, 5882 are furnished by Scævola, Gaius, Papinian, Tryphoninus, Ulpian, and Paulus. Of these great jurists, Scævola was the most ancient, and all the others (except perhaps Ulpian) appear to have, at different periods, studied under him. So far as can be ascertained, from the very imperfect data which we now possess, the following seem to be the probable dates of occurrences in their respective lives. CERBIDIUS SCÆVOLA appears to have

¹ Tacit. Agric. s. 9.

been born about A.D. 116, and to have died about A.D. 186. He seems not to have attained any high honours in the state; but was eminent as a writer, and still more so as a teacher. TITUS GAIUS, his first distinguished scholar, was perhaps born about A.D. 128, and died about A.D. 190. He also was invested with no high official dignities; but he had the greater honour of composing the Institutes, which served as a model to those of Justinian. ÆMILIUS PAPINIANUS, by far the most illustrious member of Scævola's school, was born about A.D. 140, and died A.D. 212. He was appointed *Advocatus Fisci* by the Emperor Marcus Aurelius, A.D. 175; *Magister Libellorum* by Septimius Severus, A.D. 197; and *Præfectus Prætorio* (the highest dignity next to the imperial), A.D. 205. CLAUDIUS TRYPHONINUS, born about A.D. 152, is only memorable as an able writer, and particularly as a commentator on some of his master Scævola's works. DOMITIUS ULPIANUS, born about 160, was the most prolific writer of his time; insomuch, that the extracts from his various works occupy more than a fourth part of the whole Digest. He was raised to the rank of *Præfectus Prætorio*, A.D. 224, and died A.D. 230. Lastly, JULIUS PAULUS, was born about A.D. 165. He studied under Scævola, when the latter was at a very advanced age. He was appointed *Magister Libellorum*, A.D. 206, and succeeded Ulpian as *Præfectus Prætorio*, A.D. 230.

Now it was in the year 208 that the Emperor Septimius Severus went to Britain, where he remained till his death, which took place in 211, at York, then the provincial seat of government. That Papinian was with him at, or shortly before his death, is certain; but that he exercised judicial functions here *non constat*, for he was not the *Præses Provinciæ*, but the *Præfectus Prætorio*. As to Ulpian, it does not appear that he held at that time any office, either at Rome or in the provinces, much less that he held a judicial office in Britain, though he was certainly very eminent as a lawyer, and was just then occupied on the composition of his most valuable works. The case of Paulus was somewhat different. As *Magister Libellorum*, his duty was to receive and report on petitions addressed to the Emperor; but we

know too little of the practice of his office to determine whether he was necessarily attendant on the Emperor's person, or remained stationary at Rome (as seems more probable), transmitting his reports to the Emperor by messengers.

Whatever share these legal dignitaries may have had in the administration of justice in our island, certain it is, that long before their time, Roman civilisation, and, as a necessary consequence, the use of the Roman law, had made great progress among the natives; for thus Milton speaks of Agricola, upwards of 120 years prior to the expedition of Severus: "The winter he spent all in worthy actions, teaching and promoting, like a father, the institutes and customs of civil life. The inhabitants, rude and scattered, and by that the proner to war, he persuaded to build houses, temples, *and seats of justice*; and, by praising the forward, quickening the slow, and assisting all, he turned the name of necessity into an emulation. He caused, moreover, the noblemen's sons to be bred up in liberal arts; and, by preferring the wits of Britain before the studies of Gallia, brought those to affect the Latin eloquence, who before hated the language."¹

Observe, then, in how many different ways the Britons, in the course of three hundred and sixty years, must have been insensibly brought under the yoke of the Roman Law, by language, religion, manners, and arts.

Language is, indeed, a touchstone of union or disunion between a sovereign state and its dependency. Roman sagacity had long discovered that there was no mode of *latinising* the mind of its provinces half so effectual as that of latinising their speech, and no readier way of effecting this operation than by making Latin the language of the courts of law, where the most important concerns of every individual were liable to be brought into discussion. To this policy our own statesmen have, in modern times, been blind. Not only have they tolerated, as forensic idioms, the French language in Canada, the Persian in India, and the Italian in

¹ Milton, Hist. Eng. b. ii.

Malta (the two last being foreign to the natives themselves); but they have discountenanced, nay, actually punished some moderate attempts, gradually and cautiously made, to introduce English in our own colonial courts.

Religion, the next efficient cause of unity of sentiment, contributed also to amalgamate the population of Roman and British origin. During the prevalence of Polytheism, indeed, this was a matter of little importance, for one heathen naturally tolerated another, unless some civil interest created opposition between them. But as Christianity made progress on the Continent, it spread to Britain, and when it became the established religion at Rome, its ministers here, as well as at the seat of empire, obtained a powerful influence, and exercised it on an uniformity of principle.

The Roman *manners* were soon adopted by those Britons whom their conquerors had wisely encouraged to live under the protection of their garrisons. “*Inde etiam habitus nostri honor*” (says Tacitus), “*et frequens Toga, paullatimque discessum ad delinimenta vitiorum, Porticus, et Balnea, et Conviviorum elegantiam.*”¹ This implies a correspondent advancement in the *arts* of social life. That architecture, in particular, had been successfully cultivated, we learn from Milton, who, speaking of the latter part of the third century, says, “there were great store of workmen, and *excellent builders* in this island, whom the *Æduans* in Burgundy entertained to build their temples and public edifices.”²

Such having been the state of things in Britain during the Roman rule, that is to say from A.D. 80 to A.D. 442, we cannot but agree with Mr. Spence, that though some few British customs may possibly have been retained throughout this period (for ancient usage, where it did not contradict positive law, was always treated by the Romans with great respect), yet “there can be little doubt but that inheritance, alienation, and contracts in general were governed by the doctrines of the Roman Law; and that the Roman municipal regulations very generally prevailed in the towns, which were numerous, and many of them in a flourishing condition.”³

¹ Tacit. Agric. s. 9.

² Milton, Hist. Brit. b. ii.

³ Spence, Eq. Jur. p. 2.

At length the overgrown and ill-constructed empire of Rome began to yield on all sides to the "pressure from without." About the year 403 the Roman forces were withdrawn from Britain, to oppose the formidable incursions of the Goths; and a sort of interregnum succeeded, during which the British clergy and municipal bodies carried on the system of domestic government on those Roman principles to which they had been so long accustomed. Then followed the period, to which most of our lawyers of the last and preceding century were wont to look back, as the first era of our legislation, a sort of Saturnian age of pure Saxon polity. The southern Britons, harassed by the Picts and Scots, and abandoned by their imperial protectors, called in barbarian mercenaries from Jutland, Friesland, and the Elbe; but this part of our legal history, notwithstanding the learned labours of Mr. Turner and other investigators of Anglo-Saxon antiquities, is still imperfectly known. The very names of the first leaders, *Hengist* and *Horsa*, appear to us rather more than suspicious; for as *Hengst* and *Horse* are synonymous expressions, in different northern dialects, for the animal, horse, nothing can be more probable than that these names simply implied that the Saxon leader, or leaders, commanded bodies of cavalry. Be this as it may, the new protectors of the poor Britons soon turned on the latter, the majority of whom, after a series of desperate conflicts, were driven for refuge to the wilds and mountains of Cornwall, Wales, and Scotland.

Now, how did this new change affect the laws and usages of the country? At first the German invaders (whom, for convenience, we shall designate by the common term Saxons) were all pagans, worshippers of the *Sun* and *Moon*, of *Tuisco*, *Woden*, *Thor*, *Frea*, and *Seater*, by whose names we still designate the days of the week. As idolaters, they no doubt persecuted the Christian Britons; but, unless they had wholly exterminated them, the British priesthood must have retained sufficient influence to perpetuate among their countrymen, and probably to communicate to some Saxons, various usages connected more or less closely with divine worship: and this may help to account, without a miracle,

for the subsequent success of the monk Augustine in preaching Christianity to the Saxons.

Notwithstanding the language of many ancient chroniclers, which would seem to imply that the whole British population was rooted out of the land, we are inclined to believe, with Mr. Spence and Sir F. Palsgrave, "that on the settlement of the Saxons in England, the Roman-Britons and their conquerors became much more closely connected than their descendants have been willing to believe." (p. 4.) This appears from the circumstances of the population both in the country parts and in the towns: the Saxons were unpractised in agriculture, which the Roman-Britons had brought to a great degree of perfection; so that it was absolutely necessary for the former to employ the latter, at least as slaves, in the culture of the soil. Nor was this all; for some British land-owners were certainly allowed to retain both their possessions and their dignities. Carte proves, that four British lords attended the court of the Saxon king Athelstane, A. D. 938. In the towns the case is still clearer. The Saxons, in their native woods, knew nothing of a city life, and were wholly unfitted for trade or civic occupations; whilst the Britons, as we have observed, had numerous and flourishing towns, some prior, and many more subsequent, to the Roman conquest. Among the former was *London* itself, which in time became a place of considerable trade; and among the latter, all those which grew up under the shelter of the Roman *Castra*, such as Chester, Winchester, Gloucester, Exeter, &c. The Saxons not only preserved these towns as places of safety in time of war, but they preserved also the inhabitants for the sake of the rents and imposts which they paid. From the intercourse of both parties with each other, it must necessarily have followed, that many maxims and precepts of the Roman Law, previously in use among the Britons, were either formally adopted by the Saxons, or silently intermixed with their usages, and so formed a part of the Common Law, which has subsisted to this day.

But this is not all. We have spoken of the Saxons as Heathens. Their conversion to Christianity brought into

operation a new and powerful agency, the influence of the Anglo-Saxon *Clergy*. Mr. Spence has touched this part of his subject in a masterly manner, as we showed by a tolerably long extract in our last Number; but if we rightly understand a Note to it, we cannot but think that he has drawn a larger inference from one circumstance than the fact will warrant. He says, "The King (temp. Ethelred) is called *Christes Gespelia*. This title, or rather *Dei Vicarius*, was continued down to the time of Bracton. The King being *Christi Vicarius*, must have been the HEAD OF THE CHURCH." If Mr. Spence means, that by the common law of England the King ever was Head of the Church, though he seems to be borne out in this opinion by Blackstone¹, we must altogether dissent from his doctrine. The earliest authority on the state of the Anglo-Saxon Church is the Ecclesiastical History of the Venerable Bede, who wrote A. D. 731, and a very slight glance at that work will satisfy any one that in England, as well as in all the rest of western Christendom, the Pope alone was regarded as the visible Head of the Christian Church. We are not defending this assumption of pre-eminence on the part of the Roman Pontiff: we are simply stating an historical fact. No English monarch, Saxon, Dane, or Norman, ever arrogated to himself the title of "Head of the Church" before Henry VIII.; nor did he, till the 26th year of his reign, when, after first procuring a recognition of that title by a packed convocation of the Clergy, he prevailed on his servile Parliament to "corroborate and confirm" it by an *enacting* statute², all which would have been perfectly unnecessary, if the common law of the land for eight or ten centuries before had connected the same title with the crown. Henry's notion undoubtedly was, that having thrown off subjection to the Pope of Rome, he was to become a pope himself in England. He was to "extirp all errors and heresies," (such is the language of the statute) and, of course, he alone could determine what was error or heresy, a power which he did not hesitate to exercise with the aid of stake and faggot.

¹ Black. Comm. i. 279.

² Stat. 26 H. viii. c. 1.

The fate of the statutory title is rather remarkable, and has been but little adverted to. Henry kept it till his death. His son Edward bore it during his short reign. Even Mary, rigid Catholic as she was, assumed it on first coming to the throne; but the year following, being otherwise instructed by Cardinal Pole, who came to reconcile England to the "Unity and bosom of Christ's Church," she not only dropt the title, but caused the statute, which had given it to her father, to be repealed, together with all others which had been passed "against the *supremacy* of the See Apostolic."¹ The first parliament of Queen Elizabeth revived many of the acts so repealed; but what is very remarkable, it expressly *confirmed* the repeal of the act giving Henry the designation in question²; since which time no King or Queen of England has assumed, or been legally allowed a title, which seems to imply, and was originally meant to signify, that the sovereign has an absolute authority, not only in regard to ecclesiastical jurisdiction or discipline, but even in matters of faith and doctrine.

To return from this digression, whatever power the Saxon kings may have had in spiritual matters, Mr. Spence has clearly proved that the influence of the Saxon priesthood in temporal affairs was all but unlimited. They were the chief counsellors of the sovereign, and the indispensable advisers of the subject: they were lords paramount in the senate, and judges and advocates in the courts of justice: without them no law could be framed by the legislature, and no agreement could be drawn up between private individuals: they directed alike the worldly concerns and the consciences of men in all classes of society; and the only system of jurisprudence which they cultivated, and to which they were all strongly attached, was the Roman. Through the clergy, therefore, a large infusion of the spirit of Roman legislation must necessarily have been spread through the Common Law of England.

We have elsewhere cited several legal maxims, which are

¹ Stat. 1 & 2 Phil. & Mar. c. viii. s. 12.

² Stat. 1 Eliz. c. 1. s. 13.

commonly ascribed to the native sagacity of our ancestors¹: and perhaps it may be said that they are such as any sagacious person, in any age, might have altered. True, but they had been uttered ages before, *in the very same words*. They are taken, *verbatim et literatim*, from Papinian, Callistratus, Paulus, Ulpian, and Pomponius. "Pereant, qui antè nos nostra dixerunt!" Whole heads of law, too, we have claimed as Roman. Into this examination Mr. Spence has largely entered: he has traced the Roman mind in Saxon doctrines concerning the transfer of property moveable and immoveable, not only *inter vivos* by sale or lease, by written conveyance or symbolical delivery, but also *post mortem* by testament, with reservation of the *pars legitima*, entails, succession of the Crown, as *ultimus hæres*, &c. Of these we shall notice some particulars:—

1. *Market overt*.—The well known rule, which secures to the purchaser goods bought in market overt, is based, as Mr. Spence well observes, on the Saxon laws of C'nut and others, which declared that no transfer of goods should be valid, unless made before witnesses, amongst whom it was generally required that there should be a *gerefa*, a magistrate, a priest, or the lord of the land. Now this is precisely the old Roman *Mancipatio*, used in the transfer of quiritary property, at which, among other witnesses present, was one called the *Libripens*, or scale-holder, who, as Hugo conjectures, was in early times a patrician, a priest, or some other public personage.² The great aim of the Saxon enactments was to prevent a traffic in stolen cattle, and in an early stage of Roman civilization, when cattle and slaves (who were ranked with cattle) were almost the only species of moveable property, the object of the law was manifestly the same. The Romans, moreover, had a set form of words and actions for the transfer by mancipation, which have been preserved in a passage cited by Boethius from Gaius. The buyer of a slave holding a piece of brass (the money of that age estimated by weight), said—"hunc ego hominem, ex jure Quiritium, meum esse aio, isque mihi emptus est hoc ære, æneâque librâ;" and,

¹ No. VII. Art. VI.

² Hugo, Hist. R. Law, s. 94.

touching the scales, he delivered the brass to the seller.¹ This formality of touching the scales, too, puts us much in mind of our own usage of touching the seal of a deed, by way of acknowledging it to be our act.

2. *Transfer of Land.* The Anglo-Saxon invaders having divided the allotments of conquered land among themselves, each first owner held his share in *all-hode*, that is in entirety, which pure and absolute ownership was thence termed *allodial*, and the land might be alienated by barter, sale, gift, or will, either absolutely or on such terms and conditions as the proprietor thought fit. The safest way for all parties was manifestly to draw up the act of transfer in a book or writing, whence the land so made over to the new possessor was called *Bocland*, or Book-land; but the art and mystery of framing these conveyances was as much beyond the skill of a Saxon Thane or Churl, as that of modern conveyancing is beyond the skill of most peers or farmers at the present day. The laity could only resort to the clergy; and the clergy, with many of whom the science of the Roman law was an ordinary branch of study, could therein find rules adapted to all the ordinary transactions of life.

3. *Symbolical Delivery.*—"Some grants (says Mr. Spence) were accompanied by delivery of possession by symbol." This is evidently derived from what certain writers on the Roman law call *Traditio symbolica*. "*Symbolicam vocamus* (says Huber) *cùm non res ipsa traditur, sed actus aliquis repræsentans traditionem celebratur.*"² The Roman authorities indeed speak only of such acts as delivering a key, marking a beam, handing over the title-deeds, and the like; but the same principle which makes a key stand for a house may well make a clod of earth stand for a field, a twig for a grove, and the like.

4. *Leases.*—"Lands were let on lease, rendering a rent in money or in kind, for life or for terms of years." Here the lease answers to the Roman *locatio*, and the rent to the Roman *merces*, which, though it should regularly be in money, might sometimes be in kind, as "*si Dominus exceperit in locatione, ut frumenti certum modum certo pretio*

¹ Bynkersh. *Reb. Mancip.* c. i.

² Huber. *Prælect.* i. 2. 1.

acciperet¹;" or "si Olei certâ ponderatione fructus anni locaverit."²

5. *Wills*.—The clergy, on many accounts, were anxious to obtain, and did obtain great influence in the making of a last will and testament (which last word they adopted from the Roman law): they were the only persons who could draw up those instruments; they were directly interested in encouraging the practice of testation, inasmuch as the Church was continually enriched by bequests *pro salute animæ*: and though the minute regulations of the later Roman law were not followed, yet many circumstances connected with testation were copied from Roman practice, particularly the proving and establishing them in the county court, as the early Roman testaments were established *calatis comitiis*. On the Continent wills were registered in the *curiæ*, a Roman word from which our word *court* is derived.

6. *The Legitim*.—This designation is still given, in the law of Scotland, to that portion of a testator's property which he cannot bequeath away from his children. The *legitima portio* was in the time of Ulpian a fourth³, but it was increased by Justinian.⁴ The Roman law, in this respect, was not generally followed in England; but it prevailed in some parts of the country, and seems to be alluded to by Bede, in speaking of a Northumberland man, who divided his goods into three parts, giving one to his wife, one among his children, and one to the poor.

7. *Entails*, which are popularly supposed to have been introduced by the Normans, but which Mr. Spence shows to have been frequent in the Saxon times, were undoubtedly first framed on Roman models. Various passages in the Digest are decisive on this point. For instance, "Prædium Pater de familiâ liberorum alienari verbis *Fideicommissi* prohibuit."⁵ (On the Continent, entails are still called *Fideicommissa*.) Again: "volo meas ædes manere firmas meis filiis et nepotibus, in universum tempus."⁶

¹ Ulpian, D. xix. 2. 19.

² Ulpian, D. v. 2. 8.

³ Bede, Eccl. Hist. v. 13.

⁴ Dioclet. c. iv. 65. 21.

⁵ Justin. N. 18.

⁶ Papinian, D. xxxi. 1. 78.

8. *Ultimus Hæres*.—"The sovereign of the state, and those who claim under his authority, are the *ultimate heirs*, and succeed to those inheritances to which no other title can be formed."¹ Such is the well-known law of escheat in England at the present day; and such, we think with Mr. Spence, it was in the Saxon times. Certainly it was the rule of the edict of Theodoric, which was founded entirely on the Roman law.²

9. *Inquests of office*.—"Various edicts" (says Mr. Spence) "were issued by the Emperors from Constantine downwards, for holding inquests of office, in regard to lands which came to the Crown by escheat; and from these it can hardly be doubted but that our inquests of office, held on similar occasions, were derived."³

We said in our last, that we could not all at once assent to Mr. Spence's novel proposition, though ably maintained, that the feudal system and our ancient law of tenures came from Rome. Ably maintained indeed it is; and if we do not at once assent to it, we are still less disposed to reject it with disdain. Our readers shall judge for themselves. The learned author sets out with a novel and most ingenuous comparison of the Roman *Patronus* with the Saxon *Hlaford*; and hence he deduces the identity of the Roman *utile dominium* with the Saxon *feud*.

The Roman patronus, or head of a family, had, as is well known, besides his wife, children, and slaves, two classes of dependents, the *Clients* (a term which is but imperfectly expressed by our word client) and the *Libertus*, or freedman. So early as the epoch of the Twelve Tables (B.C. 450), we find the relation of Patronus and Clients established on the reciprocal obligation of protection by the former, and reverence by the latter; and so late as Antoninus Pius, A.D. 160, we find Aulus Gellius insisting on the same doctrine. From what class of persons the Clientes were first drawn, is a point somewhat obscure, but which may probably be thus explained: among the strangers who came, in the first ages

¹ Blackst. Com. ii. 11.

² Savigny, Mid. Ag. ii. 104.

³ Spence, p. 26.

of Rome, to settle there, some (like the Claudian race) being rich and powerful, were received into the Patrician, or senatorial class; whilst the poorer sort were only admitted among the *Plebs*, or plebeian body. These latter attached themselves, under the title of *Clientes*, to some patrician, whom they styled their Patronus, and not only treated him with great respect, but on certain occasions supplied his necessities with pecuniary aid; whilst he in return was bound to protect and assist them in the maintenance of their legal rights. As the Romans extended their conquests, whole colonies, cities, towns, villages, and corporate bodies became clients, in this sense, of influential persons at Rome; as the Sicilians chose Cicero for their Patron.¹ In like manner, at a later period, many of the Franks bound themselves as vassals to the King, or some other superior. The connection between the Patronus and *Libertus*, or freedman, is more obvious. When a master gave freedom to his slave, a new relation began to subsist between them. The latter, though he had passed from the category of *things* to that of *persons*, and could contract legal obligations and acquire legal rights, which he could not have done previously, was not placed at once on the footing of an *ingenuus*, or person born free, but was called *Libertus*, and held to be bound in gratitude to the person who had liberated him. The master, on the other hand, though no longer *Dominus*, was called *Patronus*; he was entitled as such, by law, to certain rights over the person and property of the *Libertus*; and he might stipulate for other rights at the time of liberation. Mr. Spence, after enumerating the different concomitants of Roman patronage over the freedman and the client, observes, that almost every one of them, modified and expanded (and little more), is to be found in the feudal relation of lord and vassal.

Pass we to the doctrines, as to *tenure of land*, which prevailed in the Roman provinces, and consequently in Britain. To understand the tenure, we must first know the nature of the estate. The Romans, in regard to those rights which we commonly, though somewhat loosely, call "rights of

¹ Cicero, Att. xiv. 12.

things" (including as well personalty as realty), distinguished the dominion, or ownership, from the possession, and again the direct from the useful ownership. Hence we have the terms *dominium*, *directum*, *utile*, and *possessio*, on all of which some explanation may be necessary. *Dominium* primarily signified the right of mastership, which an owner exercises over a thing; but according to the Romans, a person might be master either of the thing in *substance*, or of its *use*. In the former case, he was said to have the *dominium directum*; in the latter the *dominium utile*. Hence, one man (for instance, a landlord) might have the *dominium directum*, whilst another (for instance, a tenant) might have the *dominium utile*. The words *utilis* and *utile*, in the Roman law, have given occasion to some confusion. An *actio utilis* was a peculiar sort of law-suit, which Mr. Spence has rendered an *equitable* action, and properly, so far as regards the *principle*, in which all such actions originated; but by losing sight of the etymology, we may form an incorrect idea of the nature of the action, which appears to have been called *utilis*, because it was the extension of some strict rule of law, to *use*, that is, to the circumstances of a case, which actually occurred. Gaius furnishes us with an example of this proceeding. When a person had stipulated that payment should be made to him at a certain place, he had no *direct* action against his debtor to pay him elsewhere; but as it would have been unjust to allow the debtor to escape payment, by avoiding to go to the place agreed upon, or because he was hindered by accidental circumstances from going thither, the Prætor gave a *utilis actio* to the creditor to sue for payment at a different place. (Digest xiii. 4. 1.) Again, Scævola furnishes this example. "If a testator had bequeathed to any one his wearing apparel, and the heir had cut up the apparel for use in the funeral ceremonies, the legatee (who would otherwise have had a direct action for the clothes only) had a *utilis actio* for their value." (Digest xi. 7. 46.) And numberless like instances occur in the Digest and Codes. As the *actio utilis* was distinguished from the *actio directa*, so the *dominium utile* was distinguished from the *dominium directum*; but a man who had the *dominium utile* might be as

much master of the use, as the other was of the substance: he might be at liberty to use the thing himself, or to assign the use to another, saving always the right of the Dominus directus in the substance: and on the other hand, without losing the character of Dominus, he might be restricted, in some of these particulars, by the terms of the grant, bequest, or contract, under which he held the thing in question.

We commonly render the word "dominium," in English, by the word "property." Now the latter is derived from *Proprietas*, which, in the Roman law, seems generally confined to the dominium directum. English lawyers too distinguish a right of property as *absolute*, or *qualified*, a distinction inapplicable (at least in the sense in which they use it) to the Roman *dominium*.

Possessio, in the Roman law, is carefully distinguished from *Proprietas*. "Nihil commune habet Proprietas cum Possessione."¹ In the table of contents to p. 31. of the volume before us, the words "possessory title" are used as synonymous with "utile dominium;" but this, if not explained, might lead to error. Possession was either natural or juridical. The *naturalis possessio* was a mere bodily act. The *juridica possessio* was distinguished by the *affectio tenendi*.² That is to say, it was an occupation by or on behalf of an asserted Dominus. How far this possession was protected by law, is shown in the celebrated treatise of M. De SAVIGNY on Possession.

The difference in the tenures of land, in the Roman provinces, rested on the distinction between the dominium directum and the dominium utile. It seems, that in the early times of the Republic, some conquered lands were allotted to individuals in direct dominion, and these paid no land tax (*census*) or other public burden. Others constituted the *Ager Publicus*, or domain, first of the Republic, and afterwards of the Emperor. These were held by individuals in *useful* dominion, chargeable with the census and other burthens, which seem to have been regarded in the nature of a quit-rent, or recognition of the direct dominion remaining

¹ Ulpian, D. xli. 2. 12.

² Paulus, D. xli. 2. 1.

still in the state. The title to the utile dominium of the lands so held passed by delivery: the conditions on which they were held were very various; and so long as these were performed, the lands were descendible (in useful dominion) to the heirs, or alienable by the holders, unless otherwise provided by the original grant or allotment. They were generally called *Possessiones* indeed, not because they gave a juridical possession; for if so, they would, prior to the time of Justinian, have become the absolute property of the holders by usucapion in two years; but because they gave a natural possession. “Naturaliter videtur possidere is qui usumfructum habet.”¹ Moreover, the holders were incapable (without a special law) of ever obtaining the direct dominion; whereas between private individuals, a holder in *utili dominio* might generally, by purchase, or otherwise, acquire the direct dominion.

“The distinction above described (says Mr. Spence) between dominium utile and dominium directum, formed one of the main characteristics of the *Feudal System*: indeed, it appears in the very definition of a feud, as received in this country. Thus a feud is defined by Sir H. Spelman, the father of the modern English Feudists, to be “a right, which the vassal hath in the land, or some immoveable thing of his lord’s, to *use* the same, and take the *profits* thereof hereditarily, in perpetuum, rendering unto his lord such feudal duties and services as belong to military tenure, the *propriety* of the soil always remaining in the lord.” This definition is approved by the very learned Mr. Butler, who in terms likens the respective interests of the two parties to the dominium directum and dominium utile above described. “The passing of this latter interest by delivery, also found its way into the English jurisprudence, not only in the original creation (*donatio*) of a feud or benefice, but in its transfer or alienation.” (p. 34.)

Having thus laid a foundation for the further illustration of his subject, our author proceeds to trace the origin of feudal vassalage, the Anglo-Saxon relation of lord and man,

¹ Ulpian, D. xli. 2. 12.

and the grants of land to the man, or vassal; and then shows the connection of these institutions with the state of the Anglo-Saxon churls, or husbandmen, the condition of towns, and their inhabitants, the judicial system of that period, and the councils of the Anglo-Saxon kings: all which topics are handled with a vast profusion of learning, with much legal acumen, and with considerable force of reasoning.

The adherents of the ancient German chieftains, as we learn from Tacitus, were devotedly attached to their leaders, and sometimes received gifts from them, but not as creating an obligation of service. The successors of these chivalrous men appear to have been called on the continent, *Leudes*, *Antrustions*, *Vassi*, &c.; in England, *King's Thanes*. When the Anglo-Saxon institutions had settled down into their final condition, the King's thanes were enriched with lands, and strengthened with privileges; and, by degrees, all powerful individuals imitated the sovereign, in surrounding themselves with retainers. The superior was called, in England, the "Lord" (Hlaford), and the inferior, the "Man;" the former affording protection, and the latter reverence, exactly as the old Roman patron and client did to each other respectively. In the time of Athelstan (A. D. 925) it had become usual for the "man" to bind himself to his lord by an oath, the terms of which were fixed by that monarch. Subsequently the submission was termed *homage*, and the bond *allegiance*; and as the sovereign was lord of his subjects in general, the modern oath of allegiance was doubtless derived, with some modifications, from the oath framed by Athelstan. Down to the time of William III., however, it was expressly confined to "*terrene honor*;" for the *homo ligius* was only under a temporal bond to his feudal superior, which was not understood to derogate from his spiritual obedience, in matters of faith, to Holy Church. In the Saxon times, the relation of lord and man had become so general, that a lordless man was synonymous with an outcast. As the relation was founded on contract, it was not confined to military service, but might be accompanied by any conditions, which were mutually agreed upon. The lord appears to have claimed some share of the man's money and goods at his decease, as the Roman

patron did of the property of his *libertus*. Down to the Norman Conquest, the bond of lord and man was personal, and might, or might not have been accompanied with a grant of land; but William allowed no person to do homage to another, unless in respect of the tenure of land: thus effecting a change, which has tended to mislead later writers, as to the analogy between Roman patronage and Saxon vassalage. Grants of land there doubtless were, from very early times, among the Saxons; and some of them were allodial, i. e. conveying a *dominium directum*; but the far greater part conveyed only a *dominium utile*, and the terms employed were frequently of Roman origin. The very word *Clients* was sometimes used to denote the grantee, *Beneficium* to denote the feud, or thing granted, and *Patrocinium* the authority of the lord; while the Roman expressions *possidendum* and *fructum* commonly signified the exercise of the right given. The *Lehn-recht* of the Germans seems to be connected with the Anglo-Saxon *Leana*, loans, which was sometimes applied to the feuds or benefices; and though this word is not of Latin derivation, its purport bears a strong analogy to the *precarious* tenure under which lands were sometimes held of Roman patrons. There is no ground, however, for the supposition generally adopted from the Book of Feuds, that all feudal lands were originally held on so fragile a tenure; or that the introduction of the power of alienation formed an era in the history of benefices. On the contrary, there is every reason to believe that the Anglo-Saxon sovereigns, as well as their continental brethren, made, from the very first, some grants of transmissible or hereditary benefices; and that the various gradations of preference and regard for the individuals produced a correspondent variety in the terms of the grants, both as to the conditions imposed, and the duration of enjoyment.

There is one class of these grants which deserves, from its important effect, particular notice. "The kings (says Mr. Spence) not unfrequently granted a principality, district, or county to a vassal, to be held on the condition of military service, which thus became a *feudal principality*. Edmund having acquired the county of Cumberland by conquest,

granted it to the king of Scotland, on condition that he should serve with Edmund, in his expeditions by sea and land." (p. 48.) We take rather notice this passage; because, though some such *feudal principalities* have existed to our own times, the nature of their constitution has often been misunderstood. Thus the commissioners for Malta state broadly in their Report of March 26. 1838, that the government of that island under the knights was "an independent state." It was no such thing. Charles V. and his mother Isabella granted it in 1530, on certain conditions, to the knights of St. John, who held it *as a feudal principality*. The legal consequences of this tenure are very material. It was an express condition of the grant, that if the knights should ever surrender the possession of the island they should forfeit all their rights, and the island should revert to the Sicilian crown. In 1798, this forfeiture was incurred by the knights, who surrendered *their rights* in the island to the French Republic; but even then they did not pretend to cede the *sovereignty* of the island, which, on the contrary, was expressly reserved to the crown of Naples in the very act of cession. Two years after this, the French garrison of Valletta capitulated to an English general; and many people erroneously suppose that the British title to the sovereignty of the island rests on that capitulation. If so, our title would be unsound indeed; for in the first place, the capitulation says not a word about the sovereignty, but simply gives up the military occupation of the city and forts of Valletta, all the rest of the island (that is to say full nine tenths of it) having been for two years previously in the possession of the native Maltese; and secondly, as the French never had the sovereignty of the island, a French general could not possibly cede it to any power; for *nemo plus juris ad alium transferre potest quam ipse habet*.¹ The British title, as we shall presently show, rests on a much firmer and more indefeasible basis.

The tenure of land subject to services did not always originate (among the Anglo-Saxons) in the grants of *lords*: sometimes it resulted from a voluntary surrender by the

¹ Ulpian, D. l. 17. 54.

holder of the land, in order to become a lord's *man*, and so to obtain the protection of a powerful superior. This practice also (as Mr. Spence has shown) was of Roman origin. It appears, both from the Theodosian and Justinian codes, that many persons in the Roman empire executed charters of *commendation*, placing themselves and their lands under the patronage of a *magister militiæ*, a *dux*, *comes*, *proconsul*, *vicarius*, or other powerful individual. It subsequently became a known rule of the Feudal law, that where the lord was unable to protect his vassal, the latter might *commend* himself and his lands to a more powerful lord; and this was exactly the case of the Maltese. The King of Naples, to whom the knights had forfeited Malta, was unable to protect the inhabitants, who at first by their own sole exertions, and afterwards with English aid, had expelled the French invaders. The Maltese, therefore, had a legal right to tender, and did tender the sovereignty of themselves and their island to the King of England, who, in 1813, formally received them as subjects of the British crown. Subsequent treaties with other powers recognised this sovereignty, but could add nothing to the validity of the title, as between the sovereign and his new subjects.

The constitution of society, in the Anglo-Saxon times, may be described in very brief terms. Under the King were the clergy and the laity. In spiritual matters, indeed, the clergy were governed only by the canons of the Church; but, in temporal concerns, they ranked, in proportion to the degrees of their own hierarchy, with the corresponding classes of lay freemen. The laity, as among the Romans, were either free, or slaves; but among the former there was a marked line of distinction, the higher freemen being called *Thanes* (of whom the most eminent were the *Duces*), and the lower being designated as *Ceorls*, or *Churls*, who were attached to the soil, and so closely resembled the Roman *Coloni*, that their condition was, no doubt, derived from the laws relating to the latter, in the Roman Codes and Digest. The labouring class, whether employed by *Thanes* or *Churls*, were mere slaves. Such was the state of the rural population; and similar classes were to be found in the towns,

where there were, besides, manifest traces of the Roman municipal institutions, and in particular the *Gilds*, or companies of artizans, answering to the Roman *Collegia*.

The important subject of the judicial institutions of the Anglo-Saxons is treated by Mr. Spence with great clearness; but it is scarcely necessary for us to follow in detail his remarks on the ordinary and extraordinary courts, the former including the Shyre-motes, Burg-motes, and Hundred motes; the latter the Lords' Courts, Manor Courts, Municipal Courts, &c. One or two remarks, however, demand notice. It seems that in England, as well as on the Continent generally, the administration of justice was in the hands of the assembled Thanes, or chief landowners, whilst the Churls, and corresponding classes in different countries, though bound to attend the courts, acted neither as judges nor as jurors. Again, the Thanes, though they in fact gave the judgment, could not but be guided in law (and sometimes were expressly enjoined so to be) by the presiding ealdorman or earl, and more especially by the bishop. The formation of these assemblies was evidently copied from the old Roman *Conventus*, in which the Præses selected the Judices from the assembled proprietors. The Roman bishop, indeed, had no such judicial pre-eminence in civil matters, though he might act as an arbitrator; but then it must be remembered that there was no necessity for such services from him at Rome, where jurisprudence was a distinct profession; whereas among the Anglo-Saxons science and literature were almost wholly confined to the ecclesiastical body. A custom peculiar to criminal proceedings was established in the reign of Ethelred II., which Mr. Spence considers as the origin of our *Grand Juries*. In each hundred mote, the Gerefa (president) was to go apart with twelve senior Thanes, and present, on oath, all such persons as had committed any crime, and every person so presented was to clear himself by ordeal. (p. 63.) Of the gradual rise of the *Petit Jury*, and the modifications through which it passed, we shall hereafter have occasion to speak.

On the constitution of the legislative bodies, among the Saxons, many idle theories have been invented. It is well

observed by Mr. Spence, "that our modern notions may probably lead us to imagine, that there was more of system in the institutions of those early times, than was expected or thought of by the people themselves." And, besides, we cannot expect any great similarity of usages in tribes of various origin gradually advancing, through six successive centuries, to a degree of civilisation very far from perfect at the highest. Our first obscure lights, on this subject, are derived from Cæsar and Tacitus, on whom, and particularly on the latter, modern writers appear to place rather too implicit a reliance. Doubtless his elegant essay, "*De Moribus Germanorum*," was founded on the best information he had it in his power to collect; but a careful reader will not fail to observe, throughout, a latent desire to stigmatise the vices of his countrymen, by exalting the character of those whom they deemed barbarians. Still, as to the point immediately before us, we may assume (with Mr. Spence) that in most, if not all the German tribes, the statement of Tacitus was tolerably accurate — "*de minoribus rebus consultant Principes, de majoribus omnes*."

But we must remember that in all stages of human society, influence and authority will inevitably follow power and union. Among our barbarous German ancestors, in the time of the Roman historian, the difference of rank and station was not such as to deprive any class, except the slaves, of all political weight. When the chiefs sat together in the midst of an assembly, they could not altogether disregard the murmurs or shouts of the *corona vulgi* that surrounded them; nor were the tribes so large, as to render it impossible for the whole body of freemen to meet together in one place. The ordinary affairs of a community, however, do not require the participation of every member. These will naturally be left to the direction of the most experienced individuals, which accounts for the first part of the rule — "*De minoribus rebus consultant principes*." Again, those who have shown most skill and bravery in war, and most prudence and foresight in peace, will naturally be listened to with the greatest deference, on those weighty occasions, which call for a general meeting. — "*Ita tamen, ut ea quoque quorum penes*"

Plebem arbitrium est, apud Principes pertractentur." The Optimates alone join in the debate, the Plebs (as Tacitus very inaccurately calls them) are there only to cry "hear, hear," or "oh! oh!" but those cries, if approaching to unanimity, are decisive.

So far legislation may have been carried on, by the Saxons, in their native woods: and afterwards, when they conquered and occupied British or Roman towns, they would naturally, for a time, keep up the old form of expressing the sense of the community. But forms remain, long after the substance is gone. The kings were flattered by the clergy with the high sounding titles of a Roman emperor, and they had gradually acquired, under colour of those titles, large domains, with which they could enrich their faithful Thanes and learned Bishops. From these two classes, the monarch formed his greater and lesser councils, the origin of our present House of Lords and Privy Council. The lesser, or select body, seem to have attended the King's person, to have advised him in all ordinary matters of state, and to have recommended, on particular occasions, the summoning of the Great Council, which was usually held in the open air, by public notice, and in or near some populous city: consequently there must always have been a sufficient number of surrounding spectators to give a colour to such expressions as "*universâ consentiente multitudine*" — "*Testibus unanimiter adclamationem præbentibus,*" and the like. The acts of these assemblies, however, were in effect nothing but the declared will of the King and his advisers, among whom the clerical dignitaries appear to have had far the greatest influence, not seldom extending to the control, or even to the deposition of the King himself. The very grants, which the King made to the Church, show the great authority which the ecclesiastics claimed. The bishops almost universally signed "*consensi*" or "*confirmavi*;" none others but the Duces (the highest order of Thanes), with very few exceptions, signed in this manner. In this part of our constitutional history, we lose sight equally of German and of Roman principles, and find the Saxons entangled in the meshes of the Canon Law, not yet, indeed, systematised as a

science, but abundantly supplied with slavish doctrines, from the canons of Synods, and the decretal rescripts of Popes.

The councils, of which we have here spoken, exercised not only legislative, but executive, and even judicial functions; indeed no one had as yet dreamt of such a distinction of the sovereign powers. In all these characters, they followed Roman examples. The emperor, for legislative and executive purposes, had his *Consistorium*, and for judicial purposes, his *Auditorium*. The Saxon kings too (at least some of them) appear to have reserved to themselves the equitable interpretation of laws, in imitation of the Roman emperors. “*Inter æquitatem, jusque, interpositam interpretationem nobis solis et oportet, et licet inspicere.*”¹ Nor, as it should seem, did the king merely solve ambiguities; but he applied also the doctrines of equity to the decision of cases involving special considerations, which jurisdiction Mr. Spence regards as “the germ of the jurisdiction of the Court of Chancery.” The Saxon chancellors, indeed (if we reject the apocryphal account given of one Turketil), do not appear to have exercised any judicial authority: though there is little doubt but that the office of the chancery for making out royal charters and precepts (an office also of Roman institution) existed in the Saxon times.

“In former times,” says Mr. Spence, “it would have been too bold a flight, even to hint, that the legislative authority of the *House of Commons* might, in any the slightest degree, be traced to an institution which had prevailed in the Roman provinces.” (p. 80.) Indeed, the learned author himself seems half afraid to advance this theory; but for our part, as we are confident that the method of stopping historical research, by the rod of the serjeant-at-arms, will not be resorted to, in the present day, we do not hesitate to give our suffrage in favour of Mr. Spence’s hypothesis. We suppose that no person, with the slightest pretension to constitutional learning, will now deny, that the Commons first interfered in English legislation by way of *petition*. So it was, as we learn from the Theodosian code with the pro-

¹ Constant. c. i. 14. 1.

vincial assemblies in the Roman empire. At those assemblies (which were regularly held under the Imperial sanction) petitions were agreed upon for the reform of abuses, the amendment of the law, and the adoption of measures conducive to the public good. A deputy was chosen to lay the petition before the Emperor: it was discussed in his *Consistorium*, and many laws still extant, in the Imperial codes, were founded on such petitions. Compare this with the course pursued by King Athelstan. Royal commissioners were sent into Kent (and probably into every other county), to convene assemblies of the freemen, for the purpose of proposing such amendments in the laws, as the freemen themselves might deem necessary. Accordingly the Bishops, Earls, Thanes, and *Ceorls* met, and agreed upon eight several *capitula*, which they forwarded to the King, praying that he would point out how far they had exceeded, or fallen short of his wishes, and promising that they would conform to his further directions. Edward the Elder seems to have issued similar requisitions. The *Decretum Sapientium Angliæ*, and the *Judicia Civitatis Londoniæ*, were proceedings of the like character. The *Ceorls*, who were far removed from all participation in the King's councils, were expressly authorised to take part in these measures, and actually did so; and here we have, at the same time, a clear imitation of the *Roman Provincial Assemblies*, and the first authentic indication of *the interference of the Commons in matters of legislation*.

The clergy not only took part, as we have seen, in the meetings of the laity, but they had separate assemblies of their own, for discussing matters of purely ecclesiastical cognizance. We rather doubt, whether our North British readers will agree with Mr. Spence, that "ecclesiastical synods, composed of the clergy alone, and presided over by a bishop, were held, from the first establishment of Christianity (p. 82.); but it is certain that synods, for such purposes, and under such presidents, were held in very early times by the Roman clergy, and consequently by the Anglo-Saxons. Among the questions "universally acknowledged to be purely of ecclesiastical cognizance," the learned author justly reckons those relating "to the validity of marriage;" for (as he per-

tinently remarks) “such questions could hardly have been submitted to the judges of the county court, or to a court composed even in part of laymen;” since “no decision of theirs could have prevailed *against the canons* ;” — a point strongly dwelt upon by Lords Brougham and Denman, in the case of the *Queen v. Millis*. Far from abandoning any question of admitted ecclesiastical jurisdiction, these courts usurped an authority, in many temporal matters, especially if between members of their own profession, or if involving a breach of faith, or the violation of an oath. “Many of the titles of the canon law,” says Dr. Ridley, “such as those of *buying and selling, of leasing, letting and taking to farm, of mortgaging and pledging, of giving by deed of gift, of detecting collusion and cousenage, of murder, of theft, and receiving of thieves, and such like, although they are known notoriously to belong to the cognizance of the common law, at this day, yet, with the matters whereof they treat, were anciently in practice, and allowed, in bishops’ courts, in this land, among clerks.*” And to this opinion the very learned Mr. Somner subscribes. It would be a curious and interesting inquiry, to ascertain how many rules of the canon law (in addition to those of the Roman civil law) are to be found incorporated in our common law; into which, even in the Saxon times, some of them may have been introduced by the bishops, when sitting in the shyre-motes, or by lay presidents of those and inferior courts, in deference to ecclesiastical precedent.

The result of Mr. Spence’s researches into the state of the law of England, prior to the Norman Conquest, in 1066, may be thus briefly summed up:—

1. The Roman civil law was paramount here, from the year 82 of the Christian era, for about 360 years, till the Saxon invasion; nor was it wholly extirpated by that event.

2. After a struggle of 150 years the invaders, having obtained a complete ascendancy, and embraced the Christian religion, began in their turn to legislate, with more or less reference to Roman principles, and so continued to do for upwards of four centuries and a half.

3. During all this period, their chief advisers and directors, both in the framing and administering of laws, were

ecclesiastics, attached, from the beginning, to the study of the Roman civil law, and afterwards of the canon law, which had grown up in imitation of the former.

4. The influence obtained in the state by the high dignitaries of the Church, and in private families by the inferior clergy, enabled them to mould many public institutions on Roman models, and to regulate the ordinary concerns of civil life by numberless rules and practices adopted from the Roman Codes, the Digest, and the Canons.

5. At the close of the period under consideration, few traces appear to have remained of pure British or Saxon customs; but whether we look to the political government, the civil jurisprudence, or the judicial establishments, which then prevailed in England, we shall find their main source to have been that from which the contemporaneous civilisation of the rest of Europe flowed—the ROMAN LAW.

ART. VII.—RECOLLECTIONS OF A DECEASED WELSH JUDGE.

NO. IV.

OLD men, even eminent judges, are apt to repeat themselves, and I am not sure whether I have as yet made any mention of some young circuitiers who joined us before I was transplanted to the Principality; among them, I recollect with some interest, John Williams, or, as the great affection of his contemporaries used to call him, Johnny Williams, occasionally adding an adjective connected with size, in case the substantive might not enure to a sufficiently certain intent of diminution. He had attained no great share of business at the period of my translation; but he, from the first, had some share, and from the first showed his perfect fitness to conduct any case entrusted to him, for he was singularly judicious and self-denying, ever regarding the client, never considering himself, always shaping his course towards the verdict, always indifferent to display. Yet he was, as Scarlett used to say, “a very, very considerable artist” in respect of speech; and Scarlett never threw his praise away. Williams has since

attained eminence with universal assent of the Bar, and I find he has continued the classical studies which so much distinguished him when he came among us — for he lately, on visiting Paris at the peace, produced a most beautiful Greek epigram on the Apollo Belvedere, which is now in that capital.¹

Men used to speculate on the chances of success, which this very learned and excellent person might have, were he placed in parliament. For my own part, though, after my experience, I should as soon think of confidently foretelling what man taken from the Bar would make a good judge, as what man of forty, placed in the House of Commons, would make a good speaker.

There is another prediction, however, which I fear not at all to venture. I will take upon me to say, what man, distinguished in parliament, would have made a good leader of causes, had he devoted himself to his profession, and not through impatience or restlessness, or vanity, exchanged it for what is no profession at all. I so name politics, because, if a man is honest and conscientious, above making himself a mere adventurer, he cannot earn his subsistence as a politician. How can he ever think of such a thing? Is it not plain that unless he takes part with the ministers of the day, he serves without pay; and if he is resolved to stick by his party, through good fortune and through evil, he must needs always be for whatever party measures secure the possession of place, else he loses his bread. These views may be deemed very vulgar, coarse, homely. I care not. We are only considering politics as a profession, that is, as the means of earning a decent subsistence without doing what is dishonest or dishonourable — and politics, in this view, must be allowed to resemble the trade of a barrister who should work on the terms of “no cure no pay,” which we deem infamous — possibly it may even resemble a still worse course of life; that of the barrister who should sell himself to his adversary, and sacrifice his client for the lucre of gain.

However, I am now speaking of another matter, the chance

¹ It was so in 1814, but restored to the Vatican after Waterloo, of which his Honour seems to be ignorant. For this epigram see Art. X., *post.* — Ed.

of success which some men would have had at the Bar, had they continued to follow that more honest calling. And here the reflections I have been led to make naturally enough bring into my recollection one who has been very eminent in parliament, and has had great success there, though not in my opinion a speaker of the first order, but rather at the top of the second rank—I mean Mr. Canning, for he has always been peculiarly fond of place. He left the Whigs, to whom he originally belonged, and whom he has always treated with the bitterness of a deserter. He saw their hopeless condition as regarded the chances of obtaining power, and he preferred the patronage of Mr. Pitt to that of Mr. Sheridan. He quitted office with his patron, who had never let him rise high, being rather amused by him than disposed much to respect or even to trust him. Then his horror of placeless exertion broke out, so as to torment Mr. Pitt for some months of exclusion that seemed ages to his subordinates; and he literally worried him to death in order to make him declare openly against Mr. Addington; so much so that we always understood the high-minded ex-minister was obliged to forbid his young friend Walmer¹ in order to avoid his ever unceasing importunity. Finally, it was strangely surmised that when he joined in the no-popery cry of 1807 which turned out the Whigs, he had been in communication for the purpose of effecting a junction with them; and this has been very broadly and even bluntly stated in print by a popular writer of the Whig persuasion, a reverend gentleman whose wit is much esteemed in all Whigland, the author as seems generally allowed of Peter Plymley's Letters², and who plainly states the fact as a "commentary on the baseness of human nature."

Now that may be somewhat an exaggerated view of the matter; but sure I am that this passage in Mr. Canning's history, like all the others to which I have been referring, does afford a commentary on the badness of politics as a

¹ This report has been lately confirmed by Lord Malmesbury's correspondence. — En.

² His Honour is quite right in this conjecture; for Mr. Sidney Smith afterwards printed Plymley's Letters in his works. — En.

profession ; for it shows under what a bias towards steering the course that leads most speedily to the haven of place those must act who have chosen to make their subsistence depend upon getting into that harbour of refuge. I understand that Mr. Canning has afforded another such commentary, by adopting, as a kind of principle, that no man can well serve his country unless he be in office. So very prone are we to blind ourselves with false reasoning, and to colour over what we desire to do with the semblance of duty. For, assuredly, so acute a person as Mr. Canning is, must perceive that he has fallen into the same sophistry of self-deception which would be deemed at once shameless and ridiculous in a common knave, were he to lay it down as a duty incumbent upon all to appropriate of other men's worldly goods what portion might be required for their own necessities or comforts. Accordingly, I regard this place-loving propensity of Mr. Canning as having been his bane as a politician, for I can hardly call him a statesman. It has subjected his course in public life to his thirst of preferment, and his reluctance to tear himself from office. No man can well serve his country who cannot cheerfully face the disaster of exclusion from power. Such is my opinion, and I fearlessly place it in direct and diametrical opposition to Mr. Canning's notion, openly avowed by him in terms, always or almost always, acted upon in practice, that no man out of place can well serve the state. As for his boasts of having been kept out of office by his adherence to the Catholic question, I really do think this one of the most audacious affirmations I ever heard. One which, to use Sir Francis Burdett's very happy remark on a statement of Mr. Huskisson, "nothing but an inveterate habit of official assertion" could have emboldened him to make. He kept out of place by his emancipation principles truly ! Why, he turned out the Whigs in 1807 because they held these principles, and he dissolved the Parliament on a no-popery cry, whereby he obtained a decided majority in the new Parliament through the influence of the mob. He, no doubt, did remain for some five or six long years (to him centuries) out of the cabinet, his placelessness, however, pleasingly broken by a

lucrative mission to Lisbon under the auspices of the Foreign Secretary, Lord Castlereagh, with whom he had quarrelled and even fought and been wounded, owing to an intrigue to turn the latter out of his place. The result of that intrigue, quarrel, and expulsion from office was his being with great difficulty let in again, when the necessities of their situation have forced the Liverpool ministry to take him as a debater for his work and labour against the Whig opposition. But little is his new and very subordinate place agreeable to him. How, indeed, could it be when his successful adversary had his former office, the Foreign Department, and thrust him down to the India Board, not always a cabinet place? I question if he will long endure it.¹ Can any history less resemble a man's sacrificing his interest to his principles? Sacrifice we can, it is true, without much difficulty trace, — but it is of the other and opposite description.

Well! my political opinions — prejudices if you so please to term them — are leading me from the 'Bar to the Senate. But my moral made the digression — the *extra viam* — necessary. From the inglorious career of an able, a highly gifted man, and the somewhat discreditable course he has led as a politician, let us turn to what he might have been if he had never quitted the Bar — to which he was barely called, having but just put on his gown and wig, — by the temptation of political life, and the short road it is supposed to open towards an easy and brilliant success. I can have no doubt that with his powers of application, which are very great, even without any continuous study, he could have acquired quite as much law as in those times of scanty learning (materially different from

¹ Here, again, his Honour is right in his conjecture. Mr. Canning did not long endure the position described by his Honour. He soon desired to have some more independent and more creditable existence; and he was on the point of being exported outwards — that is, sent as governor to Calcutta — when the accident of his adversary's untimely end stopped his voyage, and replaced him in his former position, with the lead of the House of Commons. He became, by the other accident of Lord Liverpool's death, for a few short months Prime Minister, in opposition to his friends and in alliance with his adversaries; and it is possible, that had his Honour's reminiscences and remarks come down to 1827, he would, from Mr. C.'s whole life, have derived only new arguments in favour of the opinion so often expressed, and the advice so strongly given by him, never to exchange the Law for Politics. — Ed.

the present), sufficed to furnish out, first, an attendant on sessions, next, a half-leader on circuit, and finally, a leader there and in London. To the fame of a lawyer he never would have pretended, neither would his love of display and impatient temper have suffered him to acquire it if his taste had ever pointed his ambition in that direction. His talents for speaking would, of course, have been far more than enough to place him as high as possible among the forensic orators. As high as the first certainly not, for to be eloquent in the greatest sense of the term, as Erskine was eloquent, there must have been a depth of feeling which Mr. Canning had not; the speech must come from the heart, and must make for the heart, not proceed from the mouth to the head, and only tickle the ear on its way thither. But among speakers at the Bar his place would have been most eminent, and very possibly he might have been the acknowledged chief of that class during a large portion of his time. That he never could have made a great advocate, a first-rate leader, I more than doubt; I have a very decided opinion that he could not have risen to that eminence, the height of our profession,—and my reason is, that mere speaking is only one and by no means the first of the advocate's qualifications. In the other and more essential departments of quickness and sagacity he would probably have excelled; but in coolness, and in temper, and in correct judgment he certainly would have failed, and in the great article of self-sacrifice—of regarding only the end, of merely viewing the security of the case, the interest of the client, in putting out of view his own personal feelings, in self-denial, in abstinence from all indulgence, in resisting the temptation to make a display,—I feel quite as certain that he would have been found wanting, and greatly wanting, as I am certain that he would have had great and perhaps rapid success as a mere speaker, a ready debater, a formidable antagonist of more consummate leaders, the *summi duces* of Westminster Hall.

This is the opinion which I have oftentimes heard expressed by others at our Bench table and Circuit table, as often as the speculation came into question on which I am now descanting. We used always to consider that he would

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Recollections of a deceased Welsh Judge.

have been denied to it by the conflicting claims of politics. However, it suits better my purpose, which is not that of romance, but of practical improvement to my younger brethren, that I should add how much happier a man Lord Grenville would have been had he not quitted us, how much more agreeably he would have passed his honoured life with the constant and the independent power of exercising his great faculties in the way congenial to his tastes, having as it were his lot under his own control, than harassed by court intrigue and factious squabble, and excluded from power the greater part of his days. Let me add that he would have been a greater benefactor of his country than he has been, valuable as his services are allowed, and left behind him a higher renown than he is now likely to leave even should he again preside over the affairs of the state.

Before quitting the subjunctive for the indicative mood, I must say one word of Mr. Tierney. I have ever thought his success at the Bar, as an advocate rather than a lawyer, a matter of absolute certainty, had he, as all considerations of prudence required, continued amongst us. His tact is perfect, his discretion consummate, as far as avoiding all hazard goes; his courage in the field—before the court—would have been as brilliant as it is in debate, though in consultation it certainly would have been deficient, as his party always find it in their councils; but then his admirable nature—good-humoured, modest, easily led, prone to take advice from even many inferior minds, would have always secured his cause against any false step, through want of nerve beforehand, and no such want would ever have been found in court. Then his shrewdness would have been proverbial in Westminster Hall, his manner of examining a witness would have been perfect, supposing him to acquire the quickness which at first he was sure to have wanted. But, above all, his confining himself to the business in hand would have been a bright example to all his juniors, and his manner of speaking, I verily believe, would have proved as powerful with juries upon all ordinary occasions (forming ninety-nine in every hundred of the causes tried in our courts), as that of any one man who ever led a cause before twelve good and lawful

men. I often recreate myself by picturing a cause led by Erskine on one side and Tierney on the other; nor with all my profound reverence for the greatest of forensic heroes can I avoid perceiving how often the plain downright argumentative speaker, making his homely appeal to the common sense of his hearers, and wholly disregarding all fancy, all figure, all pathos, would have got round and got before the great orator; and how often, too, his broad, even somewhat coarse humour, might have discomfited the Tully of our Hall by bringing him down from the top of his bent to the level of common men;—in plain terms, I seem to see the laugh not seldom ready to come at Tierney's bidding and at Erskine's expense.

But here again, young man, tempted by politics, give ear to the eternal burden of my song, and think what Mr. Tierney would now give to be filling in reality the great place my fancy has made for him.

ART. VIII.—SIR CHARLES WETHERELL.

THE death of Sir Charles Wetherell makes a blank in the profession. He was an accomplished scholar, a distinguished advocate, a very learned lawyer, and a highly honourable, and, for the most part, amiable man. In all these capacities, however, his loss can perhaps be supplied. But as the representative of certain opinions, as the last survivor of a particular school of politics, we despair of finding any one to fill his place. He was, we apprehend, the oldest barrister in practice. He had been fifty years at the Bar; but he was not only venerable in years, he was the embodiment of the principles on which this country was governed for the first quarter of the present century, and he retained those principles till his death, which have been abandoned by every one else who did. In holding to those opinions the high praise of disinterestedness is to be fairly awarded to him, as it cannot be doubted that had he altered his opinions with the times, he would not for

the last eighteen years of his life have been excluded from office.

When the Duke of Wellington was installed Chancellor of Oxford in 1834, Lord Eldon attended the ceremony as High Steward. The mention of his name in the Theatre was received with thunders of applause; but he mentions himself what pleased him more:—"I will tell you," said his Lordship¹, some time afterwards to Mrs. Forster, "what charmed me very much, when I left the Theatre and was trying to get to my carriage. One man in the crowd shouted out—'There is old Eldon—cheer him,—for he never ratted.' I will not say I have been right through life,—I may have been wrong,—but I will say that I have been consistent." We shall not now enter into the merits of this quality of consistency. Whether any man in the present eventful period of the world can see so clearly before him as to be able to say such and such opinions shall guide and govern my conduct throughout life; whether having done so, when he finds out that those opinions are wrong and not suited to the times, it is his duty to change them or to adhere to them, having once professed them, and if a change is to be made, when and how it should be made, whether gradually or suddenly, at what time in this process tenacity of purpose becomes obstinacy or folly, or worse,—into all this we shall not enter. We only mean to say that if any merit does exist in retaining one's opinions to the last, to Sir Charles Wetherell it belongs in its fullest extent, and that probably to the exclusion of nearly all his contemporaries. In an age when almost all have changed either in party or principles, he remained a high Tory to the close of his career, and if Lord Eldon had returned to life, he would have found "honest Charley Wetherell," as he was called by the common people, in mind at least, entirely unaltered. We now propose giving some account of the life of one who must be admitted by all to be an extraordinary man.

Charles Wetherell was the third son of Doctor Nathan Wetherell, Dean of Hereford, and the well-known Master of University College, Oxford. During the time of Dr.

¹ Twiss, vol. iii. 231.

Wetherell, his college had great reputation. He was well known to most of the learned men of the day. We find him, according to the veracious Boswell, on familiar terms with Dr. Johnson¹; and it is to be particularly noticed, that during his mastership John Scott, afterwards Earl of Eldon, was entered as a commoner, and subsequently was elected to a fellowship. The frugality of Dr. Wetherell was considerable, as out of the income derived from his position at the University he is stated to have saved no less a sum than 100,000*l*.

The lively abilities of Charles, it is said, soon attracted the attention of his father and his father's friends, and hopes were early entertained of his success in public life. He was placed at Magdalen College, and in 1790 received his bachelor's degree. The printed lists of University honours do not reach so far back as his time; but it would indeed have been to the shame of his father if he had not been made acquainted with all the learning that the University of Oxford could then give to her students; and it cannot be doubted that he not only left the University an accomplished scholar, but that his taste for learning never forsook him.

The law was fixed on as his profession. In April, 1790, he was admitted as a student of the Inner Temple, and he was called to the bar in July, 1794. We are not overstating the amount of his learning when we say that he was a profound lawyer, deeply read both in constitutional law and the law of property; and this he acquired in the only way it can be acquired — by hard and diligent reading of the authorities. In 1808, fourteen years after he was called, a young man applied to him to become his pupil; but he declined with these words: "All the spare time I can find, I employ in reading Coke upon Littleton." We much doubt whether any draftsman of the present day is entitled to give the same answer.

Soon after he was called he betook himself to the Home Circuit, and he also attended the Surrey Sessions. In those times it was the usual practice (the discontinuance of which is still with some a matter of regret) of Chancery barristers

¹ See vol. vi. p. 71. edit. 1835.

to attend both Circuit and Sessions, and it has been supposed from this circumstance that he had intended to have practised at the common law bar ; and, indeed, the boundary line between the two bars was not so nicely drawn as it is at present. It is certain, however, that it was the Chancery bar at which he finally settled, although we shall see he retained a sufficient knowledge of the practice of the criminal courts to be able to deliver a battle there successfully in case of need.

It cannot, however, be doubted that the Court of Chancery was much more fitted for the development of his peculiar qualities than the courts of common law. Although on some particular occasions he would have been an effective speaker to a jury,—although, if confined to those courts, he might possibly, to some extent, have adapted or remodelled his style to suit their capacities, yet, judging from his speeches in the Court of Chancery and in Parliament, he would have failed in nine cases out of ten. His shot would have gone over the heads of the jury. There would have been a great deal that they could not comprehend ; and even if they had comprehended it, they would have got heartily tired. But in Chancery Mr. Wetherell found a genial soil for all his exuberance. In the inexhaustible distinctions of equity the advocate had full range and scope ; and if his theme was a suitable one, the judge before whom he practised during the greater part of his time was all that could be desired. Lord Eldon thought all the better of a young man if he commenced his career by speaking for a whole day ; he was willing to hear every thing that could be said ; and Mr. Wetherell's learned allusions, sesquipedalian words, and fanciful illustrations, were all listened to with complacency. Besides, the Chancellor, no doubt, remembered the father, under whom his early successes had been obtained, and might, for this reason, be more willing to assist the son. As practice increased, so did the learned advocate's peculiarities. His action bordered on the grotesque ; his illustrations became more quaint ; his learning more far-fetched ; his manner more strange and wild. He soon ac-

quired a character for eccentricity, and all that he did became a matter of wonder to the vulgar.

He gradually rose into considerable practice. The great chronicler of that period, Vesey Junior, if consulted, will show how very generally he was employed, and he naturally began to aspire to the honours of his profession. The granting a silk gown, however, was not then at all a matter of course to be given to any man in some practice, or at the fancy, or according to the party predilection of the chancellor. The station of a king's counsel was the grant of a monopoly for the time, and was only very rarely conferred. Whether the modern or the older practice be the better we shall not now inquire. Undoubtedly, for some reason, the position of a queen's counsel is very different from what it was in those days; and it was a rank to which Lord Eldon very rarely elevated any one. He had, however, long looked with eyes of favour upon the subject of this memoir; and after he had been twenty-two years at the bar he was called within it, a patent of precedency being conferred on him.¹

He was now on the fair road to the highest honours of the profession; but very soon after a circumstance occurred which for a moment arrayed the steadiest supporter of things as they are against the existing Tory government.

This was the trial of James Watson the elder, for high treason, in 1817; a true bill having been found against this person — Arthur Thistlewood, James Watson, the younger, Thomas Preston, and John Hooper: of these James Watson the elder was tried first, and his trial created an unusual interest. There had been great distress and great discontent among the people, which had led, it cannot be doubted, to seditious meetings and practices. These had ended in serious riots; gun-shops had been broken open and plundered, and great outrages were committed. The question, however, was whether the greatest crime known to our law, high treason, had been committed; and this depended mainly on the evidence

¹ On the death of George III. this patent of precedency expired, and Sir Charles had to fall back upon his stuff gown; and we remember his appearing in the King's Bench in that gown. He was soon after created a king's counsel.

of a person of the name of John Castle, who, if not employed by the government as a spy, as was alleged, had certainly turned king's evidence, and informed against his co-conspirators. It excited some surprise that the leading counsel for the two most prominent prisoners, James Watson and Arthur Thistlewood, should be Mr. Wetherell, who had so lately received rank in the Court of Chancery; nor was this surprise decreased when it was found that the prisoners had not come in the first place to solicit his services in the usual way, when he would have been forced to have given them, but that he had intimated to *them*¹ that he was anxious to defend them. This somewhat unusual step was set down to various causes. By some, it was considered to be taken from his honest old English dislike to the whole spy system by which it was supposed that the trial was to be supported. Others, more ill-natured, observed that as much probably to his own surprise as to that of most others, Mr. Gifford had been made Solicitor General a very short time² previous to the trial, and that among the persons who considered themselves aggrieved by that appointment was Mr. Wetherell: and it was freely said that this was the mode which he took of making the government which had thus passed over his pretensions, feel the weight of his displeasure. We pass on from these surmises to this important trial, which is to be found reported in the thirty-second volume of the State Trials; and it evidently appears from that accurate record that Mr. Wetherell was in no ordinary mood; that the whole force of the Crown officers, and the four eminent Judges who presided, Lord Ellenborough, Judges Bayley, Abbott, and Holroyd, had some difficulty in keeping him within due bounds. He had a great part to play before the country, and he was not to be prevented from playing it. Throughout the whole trial he came into constant collision with some one, the witnesses, the bar, or the Bench. "There was no use," says Mr. Attorney General (Sir S. Shepherd) "in wasting this half hour if my learned friend admit that it is evidence." Mr. Wetherell,—"I will

¹ We have heard that the go-between on this occasion was one Bryant, commonly called Larry Bryant.

² Mr. Gifford was made Solicitor General in May, 1817, and the trial took place in June.

waste an hour if I think the object is a good one." p. 91. Then again to the Attorney General, p. 186: "It is a gross misrepresentation of what I said. I never said any such thing, and it is very much like an intended misrepresentation."

Mr. Gurney having said, "As the witness has said he does not, I must object to the question being pressed further, after the decision of the Court." Mr. Wetherell,— "I will not be put down by you, Mr. Gurney." Mr. Gurney,— "I do not seek to put you down, Mr. Wetherell." Mr. Wetherell,— "I will bow to the Court, but to no one else." (p. 298.) But he did not always bow to the Court, and he occasionally drew from the Bench such strong rebukes as these. As to one of his questions, Lord Ellenborough said, — "It is really corrupting all justice when such prejudices are introduced." (p. 297.) And again, at p. 299,— "How can that question be asked? I will put it to your own good feelings, your own good sense." At p. 319. he is reproved by Lord Ellenborough for "interlarding his examination with observations;" and in the course of his speech for the defence he was repeatedly interrupted by Lord Ellenborough and by Mr. Justice Abbott, and even Mr. Justice Bayley. But all this had no effect on the indomitable spirit of the advocate. He went on just as before;— his great object was to impress on the jury that the prisoners were victims to an atrocious system of corruption, and that in defence of his clients all things were allowable and to be tolerated.

But the master-stroke of the whole defence was his cross examination of Castle. He judged rightly, that if he could destroy the effect of his evidence he should smash the whole case. We shall see that he completely succeeded; and we may point to this long examination as one of the most able on record. It was a great effort to keep the attention of the jury so long alive, as he for hours led them through the history of this man's life, varying it (or "interlarding," as Lord Ellenborough said,) throughout by quaint allusions and remarks, which, although irregular, could not be restrained by Bar or Bench. In fact, he carried every body in the court with him, as he first wrung from this wretch

the detail of his private crimes, and then most happily ridiculed out of his own mouth the story given by him of the intended plot; and finally drove him out of court, utterly discomfited and demolished.

He first proved that this Castle had been twice committed to prison—first at Guildford, and next at Abergavenny. Mr. Wetherell relieved the long examination by such observations as these: “We will take the Home Circuit first, and then we will go the Welsh Circuit.” He brought him to admit, that having been committed at the first place, for uttering forged notes, he had been admitted an evidence against his accomplices, one of whom had been hung, and the other transported; that “the same accident had happened at Guildford as had happened upon this occasion.” He made him also admit, that at Abergavenny he had been committed for first persuading a Colonel Pouvetté, a French prisoner, to break his parol, and then informing against him; but the circumstance that most damaged Castle, which was managed with great skill and humour, was, after first making him admit that he had sent his wife out of the way (which looked suspicious, as she might have been called to contradict his testimony), Mr. Wetherell, by a series of questions, drew from him the fact, that he had been connected with a Mrs. or Mother Thoms, who had kept a brothel, in which he had possibly lived, as the counsel insinuated, as “protector” or “bully.”

And then, having alluded to some other transactions, Mr. Wetherell triumphantly proceeds:—“Having gone through the head of private or domestic history, proceed we to the topics of general history.” Castle was then led through his evidence in chief, and proved that he had, in fact, enticed many persons into joining the plot. He was dismissed after a few more pointed questions.

“Who paid for your dress?” “Mr. Stafford.” “The gentleman who sits here?” “Yes.” “How long have you had that coat on?” “I have had it about a month or six weeks.” “Who gave you the money?” “Mr. Stafford.” “Has Mr. Stafford given you the pocket money you have had ever since?” “Yes, he has.” “Who furnished the

outfit for your wife's going into Yorkshire?" "Mr. Stafford."

After all this, the advocate might well say, in his speech to the jury:—"I have no doubt, if this trial went on a little longer, I should have been able to prove that Mr. Castle had been guilty of crime under every letter of the alphabet;" and he alludes to him as this "indescribable villain,"¹—"this wretched and miserable man, coming into court to give evidence dressed in the coat, waistcoat, and breeches of the crown, paid for by Mr. Stafford of Bow Street."

This, we apprehend, was the turning point of the case. There could be no conviction unless this man's evidence was to be believed; the other links of the chain were merely corroborative. But how, on such evidence, could the prisoner be convicted of high treason, although there is now little doubt that, in the main, Castle's evidence was true? The jury returned a verdict of "Not Guilty." The government abandoned the prosecution against the other prisoners, and the triumph of their counsel was complete; and if Mr. Wetherell desired to thwart and annoy the Government, he succeeded.

But there was another person, who was the junior counsel for the prisoners on that trial—we mean Mr. Serjeant Copley; and if the success that was obtained had not the immediate effect of securing the promotion of the senior counsel, it had some influence in that of the junior. Lord Castlereagh, who sat on the bench during the whole trial, had an opportunity of witnessing the bold determination, the power of lucid

¹ A friend writes us as follows:—"I happened, being intimate with both, to accompany Mr. Wetherell and Sir J. Copley in a coach after the speech. The first thing Copley said on entering was, 'Wetherell, where did you get the expression 'that indescribable villain?' (which Wetherell had with electric effect applied to Castle). 'It was the happiest that could have been conceived.' Wetherell only smiled, but seemed much gratified. We dropped Copley, and went together to his usual haunt, Green's Coffee-house, where we dined. You may suppose I complimented him; for in truth for the last three hours of his speech (the first hour was dull, and promised a failure) I was enraptured, more so than I can remember to have been with any other, if any speaker. He said little (being apparently absorbed in himself), and two or three glasses of wine put him off his equilibrium; but the next morning he was ready by good time to attend the Court. Copley was evidently in some alarm the first half hour of Wetherell's speech."

statement, and the great forensic talents displayed by the future chancellor, and was resolved that these should not be always employed against the crown. Mr. Serjeant Copley was shortly afterwards made Chief Justice of Chester, and in 1819, on the promotion of the Attorney General, Sir S. Shepherd, to the Chief Baronship of Scotland, and that of Sir R. Gifford to the Attorney Generalship, Mr. Serjeant Copley was offered, and accepted the office of Solicitor General. Nor was this the only occasion, as we shall see, in which the two counsel employed for Watson have crossed each other in public life.

Mr. Wetherell returned to the Court of Chancery with increased fame, and continued to be extensively employed as counsel in that court, and there he remained until a very short time previous to his death. If he did not enjoy to the last full practice, it was probably owing to his becoming careless about it. But if any new point occurred, if any special interest was attached to the case—or more than either of these, if it was of any constitutional or political importance, then Sir Charles was at the service of the parties, and would argue it as ably and elaborately as in his earlier days.

In 1820 he appeared on another stage, on which the eminent advocate has not always extended his fame. In the general election in 1820 he was elected a member for the city of Oxford, and he took his seat as the representative of principles which were then fast going out of fashion, even with his own party. Unpopular though they might be, he was determined to avow them, and the oddity of his manner obtained for him a hearing. Whatever disposition there might be to sneer, he was generally listened to. Indeed, in the full career of some of his best speeches, no one could deny that there was a dash of genius mixed up with much of heavy matter. Amidst much that was clumsy, much that was beside the question, there was a quaint originality that generally saved the speaker from dulness. Although many of the blows fell wide of the mark, and very few indeed were straightforward, yet occasionally one told with great effect. There was also much fanciful, and even whimsical allusion, much recondite illustration. There was also running through and enlivening the whole a vein of broad and even farcical humour, never, perhaps, rising into wit, but almost always exceedingly divert-

ing. Of vehement sarcasm, also, this orator was not sparing, and might, indeed, be said to pour it forth as from an inexhaustible source. Nor can it be denied that there was in his speeches occasionally a strain so wild, that, coupled with the uncouth gestures of the speaker, who bent his body to the range of the bench from which he spoke, turned his back fairly to those who sat in front of him, and grinned at those seated behind him, swung his arms wildly to and fro, and foamed at the mouth,—there was something in all this, we say, coupled with his loose, slovenly, and unbraced dress, which conveyed to the mind the idea of insanity. There was, however, “method in this madness,” as his opponents knew full well. Mr. Canning¹, on being asked his opinion as to this, said, “Oh! yes, he is certainly mad, and the only lucid interval is between his waistcoat and his small-clothes!”

His efforts in Parliament obtained for him the notice of Government. In 1824, on the promotion of Sir John Copley to the Attorney Generalship, vacated by the elevation of Sir R. Gifford to the Common Pleas, Mr. Wetherell became Solicitor General; and on the promotion of Sir J. Copley to the Rolls, in 1826, Sir C. Wetherell became Attorney General.

On the dissolution of the Parliament in 1826, Sir Charles Wetherell was returned for Plympton, a borough which was influenced by Lord Mount Edgcombe, and afterwards for Boroughbridge, a borough then the property of the Duke of Newcastle, which he represented until it was disfranchised together with Plympton, under schedule A of the Reform Act. He never had a seat in the reformed Parliament.

The course which he took in politics is familiar to all our readers. When Mr. Canning's appointment as Premier in 1827 caused the resignation of Lord Eldon and several other members of the cabinet, Sir C. Wetherell resigned his office of Attorney General. When the Duke of Wellington took office in January, 1828, Sir C. Wetherell became his Attorney General. But when his Grace's ministry, in 1829, recommended from the Throne the consideration of the Catholic claims, Sir C. Wetherell broke off from the

¹ We have heard this witticism attributed to the late Lord Canterbury.

Government, shaking the very dust off his feet from him as a testimony against them.

His whole conduct, all his speeches on the Catholic Relief Bill, were singularly manly and bold; and, however wrong he might be in his opinions, one cannot help admiring the position which he took up. Rising from the Treasury Bench, he denounced the Bill and the whole policy of the Government. "He certainly did not know whether he was not presuming to address the House in the situation in which he was now standing, or whether he ought not to speak as the member for Plympton. He was still the Attorney General, and the king's Attorney General he would remain *until actually removed!*"¹ "He had declined to draw the Bill now on the table of the House, because, looking to the oath which he had taken as Attorney General, he thought he should, by drawing that Bill, be abjuring his duty, and be drawing the death-warrant of the Protestant Church." "He would not have condescended to stultify himself by the composition of such a bill. The folly and the contradictions be upon the heads of those who did so! They might have turned him out of office, but he was not to be made such a dirty tool as to draw that bill."

And then, warming with his subject, he burst out in a torrent of invectives: "Was he then to blame for refusing to do that in the subordinate office of Attorney General which a more eminent officer of the Crown only two years ago declared he would not consent to do? Was he then to be twitted, taunted, and attacked? He cared little for being attacked, whether from the right or from the left. He dared them to attack him. He had no speech to eat up. He had no apostasy to explain. He had no paltry subterfuge to resort to. He had not to say that a thing was black one day and white another. He was not in one year a Protestant Master of the Rolls, and in the next a Catholic Lord Chancellor. He would rather remain as he was, the humble member for Plympton, than be guilty of such apostasy, such contradiction, such unexplainable conversion, such miserable, such contemptible apostasy."

¹ The words in *italics* are not in Hansard, but a friend who was present has supplied them. The cheering prevented them being heard.

On the 27th of March he spoke as Attorney General against the Bill on the opposition side of the House, (20 Hansard, N. S. 1511,) but on the 30th of March he spoke as Sir Charles Wetherell; although, from his speech, his successor (Sir J. Scarlett) was not then appointed. Indeed, Sir J. Scarlett did not take office until after the Bill had passed.

It is not our intention to give any minute account of his speeches in Parliament. Without standing in the first rank, his peculiar position, as well as his abilities, gained him the ear of the House. On the subjects of Chancery Reform, Catholic Emancipation, and Reform in Parliament, he was a frequent, eager, and, on the whole, a successful speaker. In the thousand and one fights against the Reform Bill, he was distinguished, battling to the last for his theory of the constitution; and here he once more was joined to the main body of the Tories: he was also the constant, and, we may say, inveterate opponent to all reforms in the law. He was the objector-general in the House of Commons, Lord Eldon holding that office in the Lords. We may here specially refer to his opposition to the Prisoners' Counsel Bill, and the Bankruptcy Court Bill.

One of his most successful speeches was made in opposition to Lord Chancellor Lyndhurst's Bill for appointing a new Judge in Chancery. This Bill had been brought in in 1829, but was postponed. It was renewed in 1830, passed the House of Lords, and came down in the month of June for discussion in the House of Commons, on which occasion Sir C. Wetherell moved, by way of amendment, that it was the duty of the House "before it gives its sanction to the appointment of a further Judge to the Court of Chancery, to ascertain by the examination of witnesses and other inquiries, whether a case of necessity exists for such appointment." In moving this he made a very amusing and effective speech. He caught hold very happily of the circumstance that no name was given in the Bill to the new Judge. "He knew not by what name he was to be called, whether the Orderly of the Lord Chancellor, or by some other appellation,—the existing nomenclature of the Courts of Equity was exhausted, and it would, of course, be necessary to find out a new name for him. Why, Lord Thurlow had no Vice-Chan-

cellor, no Jack Rugby, no anonymous Judge to perform his duties for him; he was therefore obliged to rouse himself to diligence and exertion, and in a very short space of time labour and discipline made him an Equity Judge." He then pressed the opinion of Sir Samuel Romilly into service with no small effect, whatever venom there might have been in his mode of treating it. "At an early period of our history it had been the practice for the Lord Chancellor, on his appointment, to deliver an inauguration speech, setting forth his high sense of the duties that had devolved upon him, and detailing the various improvements which he might intend to introduce in the constitution of the Court, and the remedies which he might propose for the redress of grievances and the reform of abuses, and Sir Samuel Romilly, referring to the speech of Lord Bacon which was preserved, and to the speeches of others subsequently, imagined the case of some Shaftesbury—some hackneyed intriguer—some debating politician—hackneyed in debate, and hackneyed on both sides of questions,—hackneyed here and hackneyed there, the ready tool of any party—the possibility of such men attaining to high places—though not now in them,—the telescopic eye of Romilly foresaw."

Here spoke the disappointed man; but he succeeded in turning public feeling against the measure; and the death of George IV., which happened shortly afterwards, gave the Ministers a convenient excuse for abandoning the Bill, although it is to be observed that a few years afterwards an act was passed without opposition for appointing not only one, but *two* new Vice-Chancellors. This speech was a favourable specimen of his powers. Occasionally he would allow his love of whim to carry him into mere buffoonery and absurd rant.

Thus, when speaking of the Roman Catholic Relief Bill he said¹:—"There is no protection in the Bill; in the matter of security for the Church, it is mere waste paper; it may be useful in wrapping up butter and cheese: the Bill may be sent as a covering for butter and cheese to those repositories of various and diversified commodities denominated in the vulgar tongue shops of greengrocers; but for any legislative or protective purpose it is an utter waste of print and paper."

This is purely in the vein of ancient Pistol!

¹ Hansard, N. S., vol. xx. 1577.

But there is another important incident in his Life to be narrated. Sir Charles Wetherell had been selected by the City of Bristol for Recorder, on the vacancy in that office caused by the promotion of Sir John Copley to the Rolls; and however agreeable his zeal against reform might have been to the old corporate body, it was highly displeasing to the commonalty. The mob were furious in favour of reform, and the active and very prominent part taken by the member for Boroughbridge had excited their utmost displeasure. This they determined to show on the first possible occasion; nor was it necessary for them to wait very long. When the time for holding the October Sessions of 1831 came round, the Recorder was informed that his visit was looked upon with alarm by the constituted authorities of the place. Sir Charles thought it right on this to put himself in communication with Lord Melbourne, then Home Secretary, and it was determined, that notwithstanding these threatening appearances, the Recorder should proceed as usual to Bristol. But it was no false alarm. His carriage was surrounded by a savage and brutal mob; he was personally maltreated, and even at one time his life was in danger, and he was forced to escape from the town in disguise. But this was not all: the most serious riots took place: the city, owing to the indecision of the magistrates and the ignorance of the military, was for a night and a day in the possession of the mob. Several of the chief buildings, including the Bishop's Palace, were set fire to; many lives were lost; and scenes especially disgraceful to a civilized community occurred. Sir Charles showed no want of courage in the hour of danger; but all the worst passions of the mob were roused, and individual efforts were hopeless.

A special commission was afterwards issued for the purpose of trying the rioters, in which Chief Justice Tindal presided.

The death of this eminent man was a sudden one. He was returning from Maidstone, on the driver's seat of a hired carriage. This was accidentally overturned, and Sir Charles thrown off. He was so much injured by his fall that a concussion of the brain ensued, and he died on the 17th of August last, in the 76th year of his age.

Sir Charles Wetherell was twice married ; first, in 1826, to his cousin Jane Sarah Elizabeth, who was the second daughter of Sir Alexander Croke, who died in childbirth in 1831 ; and secondly, in 1838, to Harriet Elizabeth, the second daughter of the late Colonel Warneford, of Warneford Place, Wiltshire, who has survived him. Sir Charles has left no issue by either marriage.

As Sir Charles remained so long unmarried, and had not only enjoyed an extensive practice for so many years, but had inherited a considerable fortune from his father, it was to be expected that his fortune should be considerable : and the expectation has not turned out unfounded. Since his death the administration duty has been paid on his personal property to the amount of 250,000*l*. He had also considerable real estates.

ART. IX. — PRISON DISCIPLINE. — THE SEPARATE SYSTEM.

1. *The Advantages of the Separate System of Imprisonment, as established in the New County Gaol of Reading, with a Description of the former Prisons, and a detailed Account of the Discipline now pursued.* By the Rev. J. Field, M.A., Chaplain to the Gaol. London: Longman & Co. 1846.
2. *Tenth Report of the Inspectors of Prisons. Presented to both Houses of Parliament, by command of Her Majesty.* 1845.
3. *Report of the Committee of Magistrates on the present State of Prison Discipline and Management in Surrey. Presented to the Court at the Easter Quarter Sessions,* 1846. London: Printed by D. Batten, Clapham Common.
4. *Observations in Reply to the Letter of Sir R. Vyvyan, Bart., M. P., addressed to the Magistrates of Berkshire, on the subject of Prison Discipline.* By Wm. Merry, Esq. Printed for George Lovejoy, Reading ; Whittaker, London, 1845.
5. *The Separate System Combined with corrective Instruction, as established in the County Gaol, Reading, vindicated from the aspersions of Sir Peter Laurie.* By Wm. Merry, Esq. Lovejoy, Reading ; Whittaker, London, 1846.

THE time has now arrived when it behoves the government of the country to come boldly forward, and propose for the sanction of Parliament a comprehensive and uniform system of Prison Discipline. Nine years have elapsed since the Inspectors of Prisons presented their admirable second report, in which they explained the system of separate confinement, and advocated its general adoption, by employing arguments that have never been answered, and by referring to facts which cannot be denied. Each year's experience, since the date of that report, has forcibly illustrated the wisdom of the plan then suggested; the prejudices and misconceptions which at first opposed its progress, have yielded by little and little to the overwhelming mass of evidence that has been accumulated on the subject, till, at length, with the exception of Sir Peter Laurie and Sir R. Vyvyan, whose opposition to the scheme may be deemed by some as an argument in its favour, every man practically acquainted with the subject is ready to admit with the inspectors, "that separate confinement is the most efficient plan which has hitherto been devised for the government of prisons."

How, then, does it happen that this system has not been universally adopted? The reason is obvious. The several counties and boroughs already have gaols capable of holding, *quocunque modo*, the offenders consigned to them. The adaptation of these gaols to the separate system would, in many instances, occasion a considerable outlay, while, in not a few cases, the alteration would be impracticable; and here, therefore, new prisons must of necessity be built. All this would require money; and before money can be obtained rates must be levied, and that, too, upon persons, many of whom have themselves the power of putting a veto on the additional expense. We mean not to speak disrespectfully of the magistrates as a body; but it is notorious that a large proportion of those who attend Quarter Sessions, and who, consequently, from time to time are called upon to vote upon questions of proposed gaol improvements, have very little practical information on the subject under discussion. Though possibly they acknowledge in the abstract the evil of unrestrained gaol association, and, with Laodicean lukewarmness,

admit that "something must be done," they either content themselves with sanctioning rules for the adoption of the silent system, as if that plan were capable of checking contamination to any appreciable extent, or, regarding the unfortunate prisoners as a Pariah caste, incapable of amendment, and undeserving of commiseration, they are apt, from session to session, and from year to year, to put off the discussion of the distasteful subject to a more convenient season. These observations, indeed, are by no means of universal application; and it gives us sincere pleasure to state, that at Reading, Shrewsbury, Bath, Usk, Preston, Petworth, Hertford, and Buckingham, the separate system is already established; while at Leicester, Northampton, Gloucester, Stafford, Winchester, Warwick, Kirkdale, Clerkenwell, Aylesbury, Tiverton, Bristol, Banbury, Birmingham, and Liverpool, the justices, in pursuance of a policy alike liberal, humane, and enlightened, have sanctioned the erection of prisons upon a similar plan. Still, these gaols form but a small proportion of the entire penal establishments of the kingdom; and it is because we feel that years and years may elapse before the examples they so nobly set shall be followed throughout the length and breadth of the land, if each county and borough shall be allowed to obstruct the general amendment, that we call upon the government and the legislature to interfere, and to render the universal adoption of the separate system compulsory within a limited period. It was only last session that this course was felt to be necessary with reference to county and borough asylums for pauper and criminal lunatics¹, the act passed in 1828², which rendered the erection of such asylums optional, being found by experience insufficient to effect that national object. Now, without attempting to question the importance of providing for the due care and maintenance of the insane, we are surely justified in contending that it is at least equally necessary, whether we regard the general peace and well-being of the country, or the temporal or eternal interests of our penal population, to enforce such measures of prison discipline as may make the

¹ 8 & 9 Vic. c. 126.² 9 G. 4. c. 40.

punishment of imprisonment an object of dread as well as a means of reformation; or such, at all events, as may prevent our gaols from being, what they now are, the best schools ever invented by the folly, cruelty, or thoughtlessness of man, for deadening religious feelings, degrading the moral character, and teaching and disseminating every species of crime.

That this is not an overwrought picture of most of our prisons, called, as though in mockery, houses of *correction*, is abundantly proved by referring to the Reports of the Inspectors of Gaols, the 10th of which, presented to Parliament last session, contains, in almost every page, conclusive evidence on the subject. Before, however, we refer to these blue books, we would draw attention to the Report of the Committee of Surrey Magistrates, which we have placed at the head of this article. After stating that there are four prisons in that county, the gaol being conducted on a system of simple classification, and the houses of correction at Brixton, Guildford, and Kingston, on the classification and silent system, they observe, with reference to the first, that

“Girls are in the same class with female adults; boys of all grades of delinquency are placed together, &c. * * * Such as are under sentence of transportation, those convicted of misdemeanors, and of assaults, are alone engaged at labour, for which they are brought together in the day-room of class four; all the other prisoners pass the day in perfect idleness. They may converse freely, provided they are not noisy or boisterous. * * The governor states that the prisoners can communicate with each other at night, by calling through the ventilators, and no doubt do so. * * He also says, that he has always been, and still is, strongly of opinion that the prisoners congregating together during the day is fraught with evil.”

With respect to Kingston, they state—

“That classification as a part of a system is not attempted here. This prison professes to be conducted upon the silent system; but the means of communication are so easy and constant, that it is very imperfectly carried out. On its introduction, we are told that prison punishments increased *six hundred-fold*. There is perhaps no prison in the county from which we have such strong and explicit evidence to the fact, that imprisonment there, instead

of having conduced to improvement, has led to contamination; and that the evil has arisen from the freedom of intercourse which the discipline allows. Such being the case, it is distressing to think that the great majority of inmates are under summary convictions."

As to the House of Correction at Guildford, they report:

'That the silent system is merely nominal;' so that, according to the evidence of the chaplain, governor, and others, 'whatever takes place within the prison, as to the arrival or discharge of any prisoner, his offence and sentence, circulates from one to another, and is immediately known to all;' that 'in the female wards there is no night watch;' that 'female prisoners, whatever their offences, work together in a common room during the greater part of the year;' that 'prisoners of all classes mess together in a common room, and much intercourse takes place during meals; they barter and sell their food, of which instances are constantly brought before the notice of the visiting committees;' and that 'when the prison is full, three or four prisoners sleep in one bed: on such occasions two beds are drawn close together, all the prisoners sleeping under the same covering.'

They further state, that, at the time of preparing their report, thirty-two females were in the prison; the only place for whom during the day was—

"A small room, measuring 13 feet by 13 feet, and 10 feet high, being little more than 55 cubic feet per head."¹

In short they were packed about as close as a drove of Tipperary pigs in a Great Western railway truck.

The arrangements at Brixton are of the same character; for we find that, though the silent system is enforced there by day, and that too with great severity, yet "three prisoners frequently, and four occasionally, occupy the same cell at night," this cell being, as we learn in another place, "8 feet by 6 feet, and 8 feet high." Such being the mode of conducting this prison, we scarcely want the authority of the governor, who "states it to be his decided opinion, that the present system of discipline at Brixton is not calculated to produce any improvement in the prisoners, but that they may be rendered worse by imprisonment in that House of Correction."

¹ There is some mistake in this report, assuming the size of the room and the numbers of the prisoners to be correctly stated, it would be something less than 53 cubic feet per head.

The committee, after expressing their opinion, "that the prisons of this county, both as to accommodation and discipline, are by no means in a satisfactory state,"—an opinion, in which, by the way, we heartily concur, though we should have couched our ideas in less scrupulous language, close their Report as follows:—

"We also think that our present system of prison discipline *neither operates as a punishment, nor as a means of reformation.* As far as we are able to judge, we are of opinion that the *separate system offers the means of great improvement in both these points;* but at the same time, it appears to us, that it would be *unwise to incur the very large expense* which would be necessary to carry out the separate system in this county, till the experiments which are now in progress in other counties have been more fully tested."

Most lame and impotent conclusion! Can it be believed that Lord Lovelace, Mr. Freshfield, Mr. Penrhyn, Mr. Puckle, and the other able men who formed that committee and signed that report, really entertained the slightest doubt respecting the intrinsic merits of the separate system? Their attention had been especially drawn to the subject. The conclusive arguments in favour of separation, urged by the Inspectors in 1837 and 1838, and the remarkable confirmation of the soundness of those arguments, which had been afforded by a lengthened trial of the system in America, in Switzerland, and at Glasgow, must, or at least ought to have been known to them. The model gaol at Reading had been open for nearly two years¹, and the success of the discipline there established had exceeded the most sanguine expectations of the Berkshire magistrates. At Shrewsbury the plan had been tested for a much longer period, thirty-seven cells having been occupied since Nov. 1838; and so convinced were the Shropshire Justices of its beneficial effects, and so determined were they to adapt their prison to the system, that, by March 1844, no less than 130 cells had been duly certified as fit for separate confinement.² In short, no one circumstance had transpired, which was calculated to cast a doubt upon the efficiency of the system, but, on the contrary, every fact connected with the subject, which the

¹ Field on Pr. Disc. Rep. iii.

² Tenth Rep. of Insp. part iii. p. 1.

most cautious and scrutinising inquiry had brought to light, only tended to establish on a firmer basis the positive and comparative merits of the system. Almost throughout Europe those merits are recognised; for in France, Prussia, Denmark, Sweden, Norway, Poland, Hungary, Holland, Belgium, Nassau, Berlin, Frankfort-on-the-Maine, Ham-burgh, and Switzerland, numberless prisons have been built or are in course of erection on the separate principle. We are surely then justified in concluding that the Committee in Surrey, while advising the postponement *sine die* of any amendment in their prison discipline, were not actuated by any undefined dread of the evil results that might arise from separate confinement, but that [the real cause of their non-interference was this; — they had not the moral courage to grapple with the difficulties of the case, and at once to vote a large sum, say 100,000*l.*, for the erection of a new prison. They never seem to have remembered that the amount required might be raised by loan, and be paid off by instalments, ranging over twenty or thirty years¹, so that the annual increase of the rates would, in a large and populous county like Surrey, be scarcely felt. Neither does it appear to have occurred to them, that the present outlay, necessary for introducing the separate system, might, and probably would, effect a large ultimate saving; first, because the severity of the punishment would naturally occasion a diminution of offences; secondly, because the same cause would warrant the infliction of shorter periods of imprisonment; thirdly, because the nature of the discipline is, in a remarkable degree, calculated to reform the convict; and lastly, inasmuch as the system renders it almost impossible that the prisoner should be further contaminated.

We have noticed this report at greater length, since it affords a striking instance of the evil of allowing local authorities to decide on subjects of national importance; and certainly, if there be any subject in which the whole nation is interested, it is the suppression of crime.

Turning now to the Tenth Report of the Inspectors, we find that the Magistrates of other counties and boroughs

¹ See 4 G. 4. c. 64. ss. 54, 55.; 5 & 6 Vic. c. 98. ss. 3, 4, 9, 10.

have been equally remiss with the Justices of Surrey, in not affording proper gaol accommodation, and in refusing to sanction the separate system. Let us take, for instance, the gaols and houses of correction at Exeter, both for the county and city, and the borough gaol at Plymouth. In the county gaol, where solitary confinement prevails to a considerable extent, the cells are damp in winter, ill ventilated, and so cold, that prisoners are permitted to retain their blankets to wrap themselves in by day. Moreover, persons confined in them have no means of communicating with the turnkey in case of sudden illness.¹ With respect to such male prisoners as are not sentenced to solitary confinement, "there is no employment for them except that of cleaning their own cells; they are associated together in day-rooms, professedly upon the silent system; but as they are not always under the observation of an officer in the yards and rooms, the discipline in this respect is only nominal."² The county house of correction is equally disgraceful; for containing, as it does, only seventy small cells, and the daily average of prisoners being not less than 180, several prisoners are necessarily *confined together in the same cell for many hours*. Well may the chaplain observe, that "it is impossible to say how greatly this state of things, notwithstanding the best exertions of the officers, frustrates the discipline of the prison, and prevents the house of correction from proving, to the extent it could be wished, a place of reformation."³ The Inspectors report, that

"The crowded state of the county prisons imperiously demands the adoption of some measures for their relief. The insufficient accommodation of the prisons for the number of prisoners committed to them, leads unavoidably to the relaxation of discipline, to the neglect of classification, and to the most demoralizing association of the prisoners, who are crowded, three together, in cells not large enough for the reception of more than one inmate."⁴

With respect to the Exeter City prison, the inspector reports that,—

¹ Tenth Rep. of Insp. part iii. p. 107.

² Id. p. 115.

³ Id.

⁴ Id. 129.

"Owing to defective accommodation, the tried and untried prisoners are associated together in the day-rooms. One of the rooms at my visit contained a prisoner sentenced to ten years' transportation, one committed for trial, and two remanded. There is no regular system of discipline; noise and disorder are prevented, but more quiet communication is unrestricted. * * * There is one room for female prisoners committed for trial, a second for convicted felons, a third for prostitutes; but the want of proper accommodation prevents any further classification, so that the young are necessarily associated with old offenders, the comparatively uncorrupted with the most hardened and shameless. * * * It has already been stated that clothing is not given to male prisoners, however ragged and destitute. Vagrants are not even provided with shoes, but are obliged to work on the treadmill barefooted. * * * The poor debtors are not allowed the accommodation of bedsteads, but are placed to sleep, six in a row, in pens upon the floor of their common dormitory. A practice so calculated to degrade suffering humanity is but feebly defended by considerations of economy. * * * Itch has been very prevalent, as might have been anticipated from the imperfect examination of prisoners on admission."¹

The Plymouth gaol forms the climax to these horrors, and the inspector reports that—

"The imperfections of this prison, both as to construction and discipline, are scarcely exceeded by those of any other in the kingdom, when considered with reference to the extent of population, and to the importance of the town of Plymouth. * * * It cannot be said that there is any male officer belonging to the prison, for the gaoler holds another office, which obliges him to be much absent, and there is no turnkey under him. The matron, who is the wife of the gaoler, resides in apartments contiguous to the females' prison, and receives only 5*l.* per annum for her services. No chaplain, as required by 4 G. 4. c. 64. s. 28., has ever been appointed. The prisoners of both sexes are taken into the council-room on Sundays, to await the chance of some dissenting minister coming to preach to them."²

Now, are not such abuses as these positively monstrous?

¹ Tenth Rep. of Insp. part lii. pp. 132, 133, 134.

² Id. 141.

That Plymouth, one of the largest and most flourishing towns in the kingdom, should be permitted to conduct in so disgraceful a manner a large gaol, in which during the year ending Michaelmas 1844, no less than 417 persons were for different periods confined¹, is an outrage on the rights of humanity which no Christian government should for a moment tolerate. It is true that in 1843 negotiations were set on foot between the justices of Devonshire and the town council of Devonport, with the view of establishing a district prison; but although an able report upon the subject was prepared by a committee appointed for the purpose, yet when that "report was taken into consideration at the Epiphany Sessions of 1844, it was resolved by the Court that *no further proceedings whatever should be taken in the matter*²," and none have been. Whether this abortive attempt reflects honour or discredit on the parties concerned, we leave others to determine.

Again, the inspectors report of the Bedford county gaol, that —

"Its construction is such as to set at nought many of the most essential provisions of the gaol act; to compromise the health of the prisoners, to render discipline impracticable, and to subvert every moral object of imprisonment. * * * * The discipline of this prison has undergone no improvement, or, to speak more correctly, there exists no discipline to improve. It has yet to be created; but cannot be so, without a complete alteration of the prison construction, and an increased staff. There is but one male turnkey, and he has frequently to officiate for the governor, &c. * * * There is no night supervision, the turnkey sleeping in the lodge. * * * The male prisoners are provided with no employment whatever. They clean in turn their own day-room and yards. * * * Silence is not professed to be enforced on the convicted, and, therefore, no breaches of it are punished, unless they amount to noisy or riotous proceedings, while these must be bad indeed to insure detection."³

After citing some extracts from the prison journals, illus-

¹ Tenth Rep. of Insp. part iii. p. 143.

² Id. p. 129.

³ Id. part i. p. 1—3.

trative of the effects of unchecked association, the inspectors thus continue: —

“Such are some of the consequences of the defective construction of this prison and the absence of means of discipline; — the desecration of the sabbath by broils and fights, in which the combatants are stripped; the interchange of communications between the sexes; and the compromising of the ends of justice by principals and accomplices being able to obtain, before trial, access to each other.”¹

Here, too, the visiting justices have repeatedly endeavoured, though without success, to prevail upon the Sessions to effect some material alterations in the prison. At the Easter Sessions, 1845, they reported that the prisoners

“Are assembled together during the whole day, not only for weeks, but even months, without any employment, and even without the superintendence of an officer to prevent the injurious and demoralising conversation that takes place. The accounts that have been given by some of the prisoners themselves of the practice pursued, and the conversation that occurs, are most painful and degrading; and many have declared that they should prefer solitary confinement as an alternative. It frequently happens that prisoners who are committed for trial, or convicted of the first offence, have associated with other prisoners who have three, four, and even eight times been previously convicted.”²

When, however, the matter was brought forward, it was again “postponed for another year, by a majority of 20 to 5, in which unsatisfactory state it rests.”³

“To-morrow, and to-morrow, and to-morrow.”

We might swell these nauseous details to almost any extent. Thus we find that at Nottingham, “the building now occupied as a woman’s prison is wanting in almost every statutory and convenient requisite. Women of all classes, whether untried or convicted, are together without the possibility of separation.”⁴ At Southwell, in Nottinghamshire, we are told, that “the exposed situation of the women’s yards has long been a great reproach and inconvenience; the women

¹ Tenth Rep. of Insp. part i. p. 4.

² Id. p. 9.

³ Id.

⁴ Id. part iii. p. 163, 164.

cannot even go to the water-closet without being exposed to view. The entire population of the prison passes by their yard."¹ And again, "The prisoners for trial are placed in rooms three or four together, without any superintendence; and the vagrants are also in a day-room without an officer."² Of the York city house of correction the inspector reports, "that unchecked association is permitted in this prison, and that, as a local establishment, it is not only valueless, but, I fear, injurious."³

Of the "defective, and, in every respect, highly objectionable prison" at Hastings⁴, we learn, that thirty-one prisoners sentenced to *hard labour* were confined there in 1844, but that *no employment of any kind* was provided. Indeed, "all prisoners, whether for trial or convicted, remain in utter idleness during the whole period of their confinement;" and so lax is the discipline, that out of a number of ninety-six prisoners, three only were punished for prison offences during the year 1844. Respecting the Dover town gaol, the inspectors make the following very sensible remarks⁵:—

"It is exceedingly to be regretted, that whilst the authorities have been solicitous about the comparatively unimportant details of improvement in the construction of this prison, they should have left unmitigated and untouched the prevailing master-evil, gaol association, which must mar the best directed efforts to render the discipline corrective and efficient. Prisoners here have the fullest opportunity of corrupting each other; they are necessarily associated in companies of considerable numbers; they may hold what conversation they please with each other, provided they do not create an undue disturbance; and it is manifest that they may communicate from ward to ward through the apertures in the wall which separates the wards from the corridor; they are either in idleness, or supplied only with a trifling quantity of oakum to pick; and, with the exception of mat-making, there is no provision made for teaching them trades, or any work which would develope the resources of their minds, and turn them from a corrupted to a virtuous course. No steps have been taken to afford instruction in reading or writing, or any other useful branch of education; and the assistance that is supplied, as to their spiritual

¹ Tenth Rep. of Insp. part iii. p. 173.

² Id. ³ Id. p. 14.

⁴ Id. part i. p. 649, *et seq.*

⁵ Id. 314, 315.

concerns is, to say the most of it, of very moderate extent. From these considerations, therefore, we submit that this prison is wanting in the essential principles of good government and arrangement, and that its discipline cannot be corrective,—at least we have been unable to collect the slightest evidence of its being so,—but, on the contrary, we think it must be apparent, that a prisoner committed for a first offence, and, in that view, comparatively innocent, must here get contaminated; that the bad will become worse; and that, consequently, the prisoners will at length go forth upon society even more expert and dangerous, from the experience they will have acquired during an imprisonment, which, under a better system, might have reclaimed them from a career of guilt to habits of industry and rectitude.”

The inspectors add, that the conversion of this gaol into one for separate confinement might be effected at a comparatively small cost; that the mayor is quite aware of the inefficacy of the existing plan of association, and has expressed an unreserved opinion in favour of the separate system; but that the want of funds is likely to prevent the Corporation from entering upon this desirable alteration at the present period.¹

We gladly turn from contemplating these examples of mismanagement, and consequent demoralization, to the consideration of the separate system, as best illustrated in the prison at Reading; a structure which we feel, with the inspectors, reflects the highest praise upon all concerned in its erection: first, upon the county magistrates, for their liberality and enlightened policy in sanctioning the undertaking; and next, upon the committee appointed for carrying out its details, and upon the architects and builders, for the zeal and ability with which they have respectively performed their arduous duties.² In the general arrangements of this prison, the great principle of *separation*, in the widest sense of the word, is secured; not only a separation of prisoner from prisoner by day and night, in every position, and under all circumstances, but a separation in distinct parts of the building, of males from females, debtors from criminals, misdemean-

¹ Tenth Rep. of Insp. part i. p. 315.

² Id. p. 34. Messrs. Scott and Moffatt were the architects.

ants from felons, the convicted from the untried.¹ It contains 205 cells for male, and thirty-one for female prisoners, each cell being thirteen feet by seven, and ten feet six inches high, and, like those at Pentonville, being furnished with a table, stool, hammock of cocoa fibre, gas burner, copper basin, water-closet, bible and prayer-book, and a few other books and necessary articles. The cells are also thoroughly ventilated, and kept at a healthful temperature, about fifty-four degrees Fahrenheit, by means of Messrs. Haden's approved apparatus; and the prisoners can obtain immediate assistance, in case of emergency, by ringing a bell, which causes a bracket to fly out from the wall in the corridor, and thus draws the attention of the warder on duty directly to the spot.² The chapel, which serves also for a school-room, the pump-house, and the exercising yards are all so constructed, that while the officers in attendance can exercise a due *surveillance* over each of the assembled prisoners, no one of the culprits can see or communicate with any other, and even, *eundo et redeundo*, no recognition or intercourse can take place, the prisoners being kept at the distance of five yards from each other, and their features being concealed, those of the men by peaked caps, those of the women by veils.

It remains to be seen how the prisoner spends his time. At six in summer and at daylight in winter, he rises, washes, cleans his cell and rolls up his hammock; at eight he breakfasts, and a quarter past nine he attends chapel. The leisure time before chapel is generally spent in preparing some lesson for the schoolmaster, which the prisoner has been recommended, but not compelled to learn. From ten till eleven he is either taking exercise in the airing yard, or employed at the pump. The hour from eleven till twelve he spends, one day, either cleaning the prison or working in his cell, and the next, receiving instruction with a class, from the chaplain, and being catechised. Between twelve and one the prisoner dines, and after dinner till three, he is either taught in class by the schoolmaster, or visited in his cell by the chaplain, or the interval is spent at the work which has been allotted.

¹ Tenth Rep. of Insp. part i. pp. 34. 41.

² Id. pp. 37—39.; Field, pp. 64. 69, 70.

From three till four he is exercised in the open air if untried; but if convicted he labours in his cell. Between four and six he is visited by the schoolmaster in his cell; lessons are repeated; and writing, arithmetic, or some other useful knowledge is taught, while the intervals are employed in work. At six he sups, and the remainder of the day, until bed-time at eight, is exclusively allowed for mental and moral improvement.¹ The work here mentioned consists of knitting, which is taught, picking coir and oakum, washing for the establishment, and occasional gardening and pumping, while such of the prisoners as understand the business are employed in tailoring, shoe-making, and mat-making.

From this sketch it is apparent that "hard labour," properly so called, is unknown in the prison, and even compulsory labour of any kind forms no part of the plan. In fact, the system is merely a severe moral discipline, calculated to make the criminal feel both the wickedness and folly of his former vicious career, and to awaken, perhaps for the first time, those sentiments of virtue, which Providence has implanted in the breast of every man, however degraded, and which, though lulled for a season, never die. None are all evil; and in the seclusion of the silent chamber, when no vicious companions are present to excite false pride or drown all reflection, conscience will exert her natural sway, while the mild warnings of the chaplain will speak forcibly to the heart.

"A crowd hideth truth from the eyes, society drowneth thought;
And being one among many, stifeth the chidings of conscience.
Solitude bringeth woe to the wicked, for his crimes are told out in his ear;
And in his solitary cell the malefactor wrestleth with remorse."²

Upon this subject the evidence of Mr. Field is of the highest value, and he tells us that the corrective effect of separate confinement is such, that he has not seen "one criminal convicted of any of the more heinous offences, and sentenced to several months' imprisonment, whose character has not been improved, and yet some, when committed, have been apparently desperate, and even so reported."³ Again,

¹ Field, pp. 131—133.

² Proverb. Philos. 2d Ser. p. 177. cited Field, 223.

³ Field, pp. 84, 85.

in his report to the Berkshire Sessions, in Michaelmas, 1845, he observes,¹

"The most hardened are in a short time subdued, and, for a season, almost overwhelmed with sorrow. * * * As the bitterness of grief subsides, the mental energies are aroused; reflection on past sin and folly is cherished, resolutions of amendment are encouraged, and it becomes my pleasing duty to direct the criminal in the use of those means which, with the Divine blessing, shall strengthen him for their performance. I may with confidence state, that the moral condition of our prisoners is in general promising. The feelings expressed, and the conduct observed, are such as become their situation. There is none of that effrontery and contemptuous indifference which characterised the criminals when associated; nor do I see any thing of that sullen disposition which prevailed amongst them, whilst the mere corporal punishment of the treadmill was enforced."

He adds, that he seldom hears the culprits deny or extenuate their guilt; while they frequently acknowledge that their punishment was less than they deserved, and express the deepest anxiety, not only for their own moral improvement, but for the correction of their families and former associates.² In illustration of the corrective influence of the discipline on the untried prisoners, he states a remarkable fact, namely, that "although no inducements whatever, excepting those which the Holy Scriptures enforce, were presented to their minds, yet, at the last sessions, *one half* of the criminals from this gaol who were convicted, *confessed* their crimes when called upon to plead," many of them having declared to him before their trial, that "they preferred to bring certain punishment upon themselves by confessing the truth, rather than endeavour to escape by such an increase of sin as telling a lie to conceal it."³

This leads us to consider that part of the system which assimilates the discipline of the untried and the convicted. Not, indeed, that the treatment of the two classes is identical, for the prisoner before trial can see his friends every day; has every facility for consulting with his legal adviser; may send and receive letters as often as he

¹ Rep. pp. 12, 13.

² Id. pp. 14—17.

³ Id. p. 21.

thinks proper; may wear his own clothes; may reject the peaked cap, though very few do so, as this mode of avoiding recognition is regarded as a merciful boon; and may receive suitable articles of food; whereas these privileges are either refused to the convict, or afforded in a far more limited degree.¹ Still, it cannot be denied, that the condition of the untried under the separate system is one of considerable privation; but the only real question is, whether the hardships and moral injuries inflicted by this plan are greater or less than those imposed, either by the silent system, or by unrestrained association. Now, under the silent system, the untried prisoner is unquestionably subjected to a greater proportion of suffering than the convict; for being unused to the petty, irksome, and irritating regulations, by which silence is sought to be enforced, and having, moreover, nothing to do but to talk, or to strive to do so unobserved, he becomes constantly amenable to prison punishment, though still innocent in the eye of the law. The effect of this plan is well illustrated by a case which the inspectors cite in their second report, where 90 untried prisoners were visited with 224 punishments, while 236 convicts were visited with 574 punishments. Besides this system, even when carried out in the most efficient manner, affords only a partial check to the evils of contamination, and totally disregards the effects of recognition; effects which, whether the prisoner be innocent or guilty — be a hardened criminal, or one open to repentance—cannot fail to be injurious in the highest degree. If, then, the injuries inflicted upon the untried are, as we have proved them to be, greater under the silent than under the separate system, what shall we say in support of unrestricted intercourse? “Ye, who are fathers among you,” may determine this question, by asking yourselves whether, if your own sons were unfortunately committed to prison, you would not wish them to be subjected to separate confinement as above described, rather than expose them to the frightful degradation and depravity of unrestrained association. Surely the principle, “if a man be innocent he should not be contaminated, if guilty, he should not contaminate,” is one which

¹ Rep. p. 49.

cannot be gainsaid; and on this principle the separate system is founded.¹ It cannot be too often repeated, that there is NO ALTERNATIVE *between separation and contamination*, and that the irksomeness of the former bears no sort of comparison with the moral and social evils of the latter.

If any evidence in support of truths so apparent is required, it is abundantly supplied by the excellent chaplain of the Reading gaol, and by the prisoners themselves who have been under his care. In the report before mentioned, he tells us that he asked every prisoner, who had been in custody longer than a fortnight, whether he would prefer to be alone or not, and that out of about thirty, only three or four desired to be associated. The answer commonly given was, "If I had been asked when I came in, or soon after, I should have chosen to be placed with others, but I can now see *'tis better to be alone.*" He adds, that he has every reason to believe that these were really honest declarations.² In the Appendix to this Report, he gives the precise answers, as taken down by himself; and we have seldom read any statements more painfully interesting. Our limits will not allow us to do more than give one or two extracts.³

"W. W., a prisoner committed for sheep-stealing, says, 'I was very "unkid" till I began to learn to read; but if I had my choice to-day, I should much rather be alone. * * * I bless God for what I have learnt. I could not have done so if five or six had been with me, and I could not have prayed to God to forgive me then as I have done; and if I had shed tears then as I do now, they *would have made game of me,*' &c. This criminal has been nearly twelve months in prison, and has displayed such sincere repentance, that he has been admitted to the Lord's Supper. He has learnt to read and write, and can repeat the Gospels of St. Matthew and St. John, besides several chapters of the Old Testament.

"T. A., aged 31, who had been *six times previously convicted*, says, 'I should like to be with others, 'tis much more pleasant; though I must say I think 'tis better for me to be alone.'

"T. Y., aged 29, had been twice before in prison, and could

¹ Merry, Reply to Sir R. Vyvyan, pp. 5, 6.

² Field, Rep. p. 26.

³ Ibid. pp. 54—61.; App. to Rep.

neither read nor repeat the Lord's Prayer. 'I am very thankful for having been kept alone; I was leading a bad life, and this has brought me to my senses. * * * Most men get worse instead of better when put in gaol together, *for what wickedness one don't know another teaches.*' Learnt to read, and showed much proper feeling. Acquitted.

"G. B., aged 30. Charged with felony; had previously been twelve months in another prison. He says, 'I would very much rather be alone than with others. * * * [In ordinary gaols] if a man has any desire for what is right, *he is only laughed at*, and it is shocking to think how *men corrupt one another.* I remember particularly a boy of 16 being with us about six weeks before trial, for killing a duck with a stone, which he afterwards took away and hid, because he was afraid of its being seen. The boy was a *steady, well-behaved lad*, and *never swore for about a fortnight* after coming; but before his trial, he used to surprise us by the way in which he swore and told lies, and seemed one of the *worst amongst us.*' This prisoner was convicted, and sentenced to twelve months' imprisonment. He has shown great signs of reformation, and has repeated nearly the whole of the New Testament. The poor boy has become an abandoned profligate: he has been committed to this gaol within the last month, and gives little hope of being reclaimed.

"G. H., aged 31. Charged with felony; has been four times in prison; father transported. 'I should like to be with other prisoners, because I now fret so much about my wife and children, and company would put the thoughts of them out of my mind; but I do think 'tis best for myself to be alone, for I pray God now to forgive my sins more than I did before, or should do now if many were with me.'

"F. W., aged 20. Charged with felony; had been previously convicted. 'I am quite sure 'tis a good deal better for me [to be alone]; I do learn something now; but when we were all together in gaol, *I learnt more wickedness in those three months than in all my life besides.*' This prisoner could read, though he did not know the Lord's Prayer. During a short imprisonment, he committed to memory two Gospels, and showed much proper feeling."

Before leaving the subject of untried prisoners, we would urge upon the attention of the Legislature the necessity of having a more frequent delivery of our gaols. The cruelty of confining men, perhaps innocent, for weeks and months

before their trial, is so grievous under *any* system, that nothing short of absolute necessity can justify such a step. Now, does this necessity exist? Surely it does not. Why should there not be eight sessions in the year instead of four? This practice is adopted in some few counties, as for instance in Surrey, and its partial adoption only places in a more prominent view the injustice of not making it universal. If it be thought that this change is calculated to impose too great a burden upon the magistracy of the country, why should not the judges of the local courts, who in the course of a few months will be somewhat idly employed, in bringing home civil justice to every man's door, be appointed to deliver the gaols at intervals of six weeks? They would perform this task with equal, and, perhaps without offence, we may add, with greater ability, than the justices at sessions; and any small additional salary they might require, would be far more than paid by the saving effected both in diet and superintendence, in consequence of thus reducing the average number of prisoners confined together in our gaols.

Although, as before stated, the compulsory infliction of hard labour forms no part of the separate system, it is not to be supposed that the punishment is a light one. So far from this being the case, we have indisputable evidence that it is regarded with the utmost *dread* by prisoners. Thus, the governor of the Brixton prison, who, we may observe, was one of the earliest advocates of the separate system in this country¹, states that, without a single exception, prisoners have always declared to him that they would prefer a longer period of treadwheel labour to a shorter one of solitary confinement.² So the keeper of the Bath city gaol represents the effects of the separate system

“to be extremely irksome to those offenders who have had experience of the latitude afforded by the system of association. They have frequently manifested to him great repugnance at the idea of being again subjected to the new discipline, though not here carried out with much stringency.”³

¹ See his pamphlet, entitled “A Letter on Prison Discipline, by Lieut. T. Sibly, R. N. Hatchard and Son, London, 1838.

² Field, p. 145.

³ Tenth Rep. of Insp. part iii. p. 40.

Mr. Field, also, in illustration of the severity of the system, cites the case of a culprit who had been six times in custody, but who, on being sentenced to three months' imprisonment in Reading gaol, begged earnestly that, rather than send him to that prison, the Court would alter his sentence to transportation.¹ Indeed, we learn from the same excellent person, and no higher authority can be quoted on the subject, that the discipline of separate confinement is "a mode of correction painful to all, but *varying in its penal character in proportion to the extent of depravity*, and therefore felt most severely by criminals the most vicious."² And again, in his Report, he states, that

"Whilst the *term* of punishment is proportioned to the nature of the crime, the *measure* of suffering differs according to the moral character of the individuals. The seclusion and deprivation of all means of sensual indulgence is, for a time, painful to all prisoners. *None*, therefore, are *without punishment*. But whilst the less vicious, ere long, find relief in the instruction and opportunities for improvement which are afforded them, the more dissolute and depraved not only feel their punishment to be far more severe at first, but give evident proof that its severity continues so long as their evil inclinations are cherished."³

It is, indeed, in every sense of the word, a most *equitable* punishment: but it is something more. It produces an effect upon the prisoner precisely contrary to that occasioned by compulsory labour; namely, *it promotes the habit of industry*. After the committal of the prisoner, rarely does the day pass but he begs for some employment. Paupers committed for refusing to pick oakum in our workhouses eagerly seek for that labour, or any other, even the most irksome, as soon as they have been confined in the silent cell for a few hours.⁴ Thus, employment being sought as a relief, and granted as an indulgence, the voluntary exercise is gladly performed: a succession of such acts produces the habit, and the pleasing association renders it permanent.⁵

If the separate system had been carried out to any great extent in this country, the best evidence of its severity and

¹ Field, p. 140, note.

⁴ Id. p. 143.

² Id. p. 138.

⁵ Id. p. 152.

³ Id. p. 34.

reformatory character would be afforded by a contrast of the number of committals and recommittals to prisons conducted on that plan, with those that have occurred, where the culprits have been either subjected to the silent system, or allowed unrestrained intercourse. In the present state of things, however, such a comparison is obviously unfair towards the separate system; yet still, notwithstanding the disadvantage under which it is made, the results shown by it are quite satisfactory. Thus, with respect to the Borough gaol at Liverpool, where silence is enforced, the inspector reports, that on the day of his last visit, out of 495 prisoners confined, no less than 309, or about 60 per cent., had been recommitted; and out of this number 18 had been in prison from 20 to 39 times!¹ Indeed, so little does the discipline of that gaol appear to be an object of dread, that out of 6235 prisoners, who were confined within its walls in the course of the year ending Michaelmas 1845, 1311, being considerably more than *a fifth* of the whole number, were imprisoned there *more than once in the course of that year*.² Moreover, the number of commitments increased fearfully last year at Liverpool; for, while in 1844 they were 4932, in 1845 their numbers had swelled, as just stated, to 6235.³ Again, at the Bedford house of correction, where the silent system is also enforced, the recommittals were, on the average of the two years, 1843 and 1844, in the proportion of one third of the whole number of prisoners.⁴ The same, or even a worse proportion is exhibited in many other prisons; as for instance, at the Westminster Bridewell, where the inspectors report that the recommitted prisoners formed nearly one half of the entire gaol population⁵; and at Coldbath Fields, where they appear by the returns to be more than a third.⁶ Again, out of 833 prisoners, who were committed to Reading gaol during the first fifteen months which followed its opening, no less than 471 had been previously in custody; but here the excellence of the system is exemplified; for 65 prisoners

¹ Tenth Rep. of Insp. part ii. p. 92.

² Id. p. 112.

³ Id. p. 434.

⁴ Id. pp. 96—105.; compare Tables.

⁵ Id. part i. p. 18.

⁶ Id. p. 423, 425.

only, or about a *thirteenth* of the whole number, had before been inmates of that prison, and only 21 had been confined there for more than a month.¹ In the present year² the recommitments to Reading bear a considerably less proportion to the number of prisoners confined, the latter being 657, and the former 297. This is still a grievously large proportion; but when we find that 76 only out of the whole number have been previously committed to the new prison, and that of those 76, 51 were incorrigible offenders, who had been previously committed, some as many as ten times, to other prisons, and 54 had merely been confined at Reading for periods varying from seven days or less, to six weeks, the figures certainly appear to establish most triumphantly the efficacy of the system. Again, if we compare, from the returns of the Berkshire prisons, the first year of the new system at Reading with the average of the five preceding years, when prisoners were associated, and the punishment was hard labour both at Reading and Abingdon, we shall find a decrease of 237 commitments, the numbers being 1089 and 842.³

Indeed, when we look to prisons only partially conducted on the separate plan, we perceive a considerable diminution, both of commitments and of recommitments. Thus the inspector observes with respect to the gaol at Bath, that from the period when the cells ceased to be occupied by more than one prisoner, "the recommitments are shown to have first undergone a sensible diminution, since they were little more in 1845 than one-third of the number of those in the two previous years; a result well worthy of attention, for it can be scarcely attributable to chance."⁴ Mr. Jardine also, in his charge to the grand jury, as Recorder of Bath, at the Spring sessions in 1845, after observing that the calendar was remarkably light, the number of prisoners being little more than half what they were in the previous year, states that this is the more satisfactory, as in the neighbouring counties, and especially in Somerset, there

¹ Field's Rep. pp. 7. 40.

² Private Letter from Mr. Field.

³ Field, pp. 74, 75.; Tenth Rep. of Insp. part i. p. 45.

⁴ Tenth Rep. of Insp. part iii. p. 40.

had been a large accession in the number of prisoners. He then adds, emphatically, "One cause for the diminution, though I do not mean to ascribe all to it, is undoubtedly the punishment of the new gaol."¹ At the October Sessions of the same year, the learned Recorder again uses similar expressions, to account for a like diminution in the number of commitments as compared with the previous year.²

In January of the present year the visiting justices of the same prison report, that the commitments still continue to diminish, and add this striking fact, that "during the last quarter, out of twenty-five prisoners committed for trial, only three have previously been inmates of the present gaol under similar circumstances, being the smallest number since the establishment of the sessions."³ The several officers, too, of the Bath prison, *who have all had experience of the old building*, viz. the keeper, matron, surgeon, and principal turnkey, all concur, as the inspector reports, "in stating that there is no comparison to be instituted between the separate and the associated system of discipline, so great is the superiority of the former, even as hitherto imperfectly carried out in the present gaol. The chaplain is also no less deeply impressed with this conviction, from his visits to other prisons where the system of association prevails."⁴ The results at Shrewsbury have been equally satisfactory, as shown by the inspector's report.⁵

Another important test of the comparative merits of the silent and separate systems, is the amount of prison punishments which it becomes necessary to inflict, in order to preserve due order and discipline. And here the difference between the two modes of treatment is perfectly startling. For instance, while the number of prisoners confined at Brixton, in the course of the year 1844, were 3584, the punishments for prison offences amounted to 5068⁶; and in 1845 the respective numbers were 2925 prisoners, and 4795 punishments. Out of this last number, 7 of the punishments consisted of whipping, 21 hand-cuffs and other irons, and 753

¹ Tenth Rep. of Insp. part iii. p. 41.

² Id. p. 42.

³ Id. 42.

⁴ Id. part i. p. 556.

⁵ Id.

⁶ Id. pp. 12, 13.

dark cells. When we find the inspectors reporting, with reference to this prison, that last year a dark cell in which they found a prisoner locked up for some prison offence — a cell containing a prisoner sick in bed — several cells in which were prisoners sentenced to solitary confinement, and the whole of those occupied by three or four prisoners, exhaled, more or less, without exception, a foul and noxious atmosphere, such as, in many cases, they found it difficult, even momentarily, to endure¹; and when we observe them corroborating this statement by numerous extracts from the chaplain's journal, varying from December 1843 down to April 1845², we can only hope that the visiting justices have taken active steps to rectify this grievous abuse, and have not followed the example of the committee of Surrey magistrates, in acknowledging the evil, and postponing the remedy.³ Again, in the Westminster bridewell, another prison where silence is enforced, the respective numbers in the year ending Michaelmas 1844, were 7004 punishments, and 6203 prisoners⁴; while at Coldbath Fields, which may be considered as the model prison on the silent system, the punishments for prison offences were, during the same period, 13,857, the total number of prisoners confined being 10,483.⁵ Still, this fearful amount of severity, which, though perhaps requisite for the due working of the system, partakes too much of despotic power to be long sanctioned in this country, even when criminals are the victims, is, at least at Coldbath Fields, considerably below the average of former years; and the inspectors, apparently with reason, ascribe the diminution, not to any improvement in the discipline, but rather to its relaxation, which, of course, affords proportional opportunities for contaminating intercourse.⁶ On the other hand, at Reading, where the entire gaol population during the present year has been 657, the punishments have merely amounted to 265⁷; a proportion, indeed, sufficiently large, yet still vastly more favourable than that exhibited in the gaols just

¹ Tenth Rep. of Insp. part i. p. 554.

² Id 554—556.

³ *Ante*, p. 157.

⁴ Tenth Rep. of Insp. part i. pp. 445. 448.

⁵ Id. pp. 423. 426.

⁶ Id. pp. 412. 415.

⁷ Private Letter from Mr. Field.

mentioned. At Shrewsbury, too, the number of punishments for prison offences, in 1844, was less than half of those during the preceding year; "a result," as the inspector observes, "doubtless to be attributed to the increased number of separate cells which came into use in that year."¹

It has been urged against the separate system, by gentlemen who love to draw upon their imagination for their facts, that the discipline is injurious to health, and mysterious warnings have been uttered on the score of madness. Let us see on what foundation these suggestions rest.

With respect to Shrewsbury gaol, the inspector thus reports on this subject:—

"The surgeon of the prison, who has held the office from a time antecedent to the introduction of the separate system, is of opinion that the health of the prisoners confined in the separate cells is *uniformly better* than that of those in the courts. * * * No cases of mental aberration, traceable to the effects of separate confinement, have occurred in this prison since the system was introduced."²

A more favourable report, if possible, is given of the Bath gaol³:—

"The medical officer represents that he has been unable to trace any case of sickness to local causes or the system of discipline in operation. He considers that the state of health has been, *beyond all comparison*, better in the new prison than the old. * * * No cases of mental aberration, occasioned by the system of discipline in force, have been discovered."

In this statement he is confirmed by the keeper and the chaplain, the latter of whom states "that he has seen no instance in which the mind of any prisoner put under his religious superintendence has been injuriously affected by the separate system." At Usk, the chaplain reports, that the separate system appears to him to be highly advantageous to the moral and intellectual improvement of prisoners; nor has he been able to discover any ill effects upon any prisoner's

¹ Tenth Rep. of Insp. part iii. p. 10.

² Id. p. 11.

³ Id. pp. 46, 47.

mind.¹ At Pentonville, the health of the prisoners is reported by the commissioners to be most excellent², and when we visited that establishment in September last, though there was much general sickness in the metropolis, we found only five prisoners, out of 439, who were on the sick list; and even these were all able to attend chapel. But the medical returns of the Reading gaol afford the most conclusive evidence on this head; for on comparing the amount of sickness during the first year of the new discipline, with the average illness of the three preceding years, the cases of slight indisposition scarcely exceed a third; the more severe cases are but one-tenth, and the deaths are one-seventh of that average.³ The table of sickness for the present year is equally satisfactory.⁴ Then with respect to the effect of the discipline on the mind of the prisoners, the testimony of Mr. Field is perfectly convincing.⁵

“I speak,” says he in his Report, “from experience, when I assert that, under the humane system of discipline now adopted in your county gaol, so far from the intellectual powers becoming enfeebled, or mental aberration being in any measure induced, the faculties have been improved and strengthened; and in no single instance has derangement been produced.”

He then adds that,

“Although twenty-seven prisoners have been in custody, one or more of whose family have been deranged, or in some cases they themselves confined in lunatic asylums, yet, so far from the treatment to which they have been subjected whilst in custody proving at all injurious, the mental faculties have not only been preserved, but in most cases surprisingly improved.”

In a letter which lies before us, bearing date last September, he also states, that “no case of insanity, or any approach to mental derangement, has occurred during the current year.” If any further evidence on this point is required, it will be amply furnished by the fact, that many of the convicts in this prison have, during the course of a few

¹ Tenth Rep. of Insp., part iii. p. 71.

² Field, p. 176.

³ Id. 177.

⁴ Private Letter from Mr. Field.

⁵ Field's Rep., pp. 6, 7.

months' confinement, not only committed to memory the whole of the four Gospels, but have written exercises which display a remarkable acquaintance with the Holy Scriptures¹: while others, who only knew words of two or three letters at the time of their commitment, have, within a month after their admission, been able to read the Bible with apparent advantage to themselves.² We state these circumstances, not merely as displaying the salutary effect of the discipline on the intellectual powers, but as calculated to raise a hope that criminals who have been eagerly so employed may have made some progress in the hard task of reformation.

We have now established by a reference to facts, which are worth a thousand homilies, the superiority of separate confinement over every other system of prison discipline known to this country. We have purposely abstained from discussing the merits of Captain Maconochie's *mark* system, by which it is proposed, first, that *labour*-sentences shall take the place of *time*-sentences, and, next, that, after the prisoner has passed through a term of probation in separate confinement, he shall be associated with a class of six or eight other offenders, the marks earned or lost by each of whom shall count to the gain or loss of the entire party. This plan was originally devised for the management of convicts in our penal settlements, and might, perhaps, be advantageously allowed to supersede the present system of discipline in those colonies. Its machinery *might*, even in this country, be adapted with profit to the more serious class of cases in which punishments are imposed exceeding a year's or eighteen months' imprisonment. On these points we here express no opinion, for we intend to take some early opportunity of explaining our sentiments respecting the punishment of transportation; but thus much we may safely say, that the mark system is utterly inapplicable to the treatment of prisoners in our ordinary gaols; and that, so far from being an improvement upon even the silent plan, it would

¹ Field's Rep. 5. 46—54. Our limits will not allow us to quote any of these exercises, but we earnestly draw attention to them.

² Field's Rep. 5.; Tenth Rep. of Insp. parts i. iv. 46.

open the door to every sort of abuse. Among the evils to which it would give rise, favouritism and inequality of punishment stand prominently forward; while the demoralising effects of association are only partially checked, and those of recognition are wholly disregarded. Besides, the system becomes a dead letter with respect to the untried.

The only remaining objection, then, which *can* be urged against the general adoption of the separate system is that of expense; and when we remember with what liberality the Legislature, only a few years back, voted the gigantic sum of twenty millions sterling, for the purpose of conferring what was regarded by some able men as a problematical benefit upon the slave population of our colonies, we cannot entertain the slightest apprehensions on this head. Let the intrinsic merits of the plan be once recognised, as they must be if men will only take some little pains to inquire, and no difficulties raised by the niggard spirit of economy will be permitted to withstand the uniform introduction of the system. One fifth of the amount raised for the emancipation of the West Indian slaves would be amply sufficient for the object we have in view; and when it is considered that this sum, large as it undoubtedly is in the aggregate, might be raised by loan, and be paid off by instalments ranging over thirty years, it dwindles into utter insignificance. Let the rates of the entire country be increased only 150,000*l.* per annum, and the whole sum borrowed, both principal and interest, will be paid within that period. We have hitherto intentionally overstated the cost of the alteration, and have allowed no deductions whatever to be taken into the account, because we can well afford to put the argument in the point of view most favourable to our opponents. But we may now confidently affirm, that so far from the introduction of the separate system occasioning any additional expense, it would, in fact, cause a very large saving.

In the first place, whether the system be adopted or not, it is obvious from almost every page of the tenth report of the inspectors, that considerable sums must, within the next few years, be laid out on our old gaols: these sums therefore should, in fairness, be deducted from the amount stated

above as requisite for the introduction of the system. Then, the staff necessary for keeping up efficient discipline on the separate plan, is greatly less than what the due enforcement of the silent system requires. Thus, the salaries of the officers employed at Coldbath Fields amount to 12,478*l. per annum*, while the greatest number of persons who, in the year 1844 were confined in that prison at any one time was 1201.¹ So, the staff emoluments of the four prisons in Surrey amount to the annual sum of 6390*l.*, while the aggregate of the prisoners confined in that county at any one time in the same year, gives the number of 727.² On the other hand, at Reading, where the annual salaries of the officers amount to no more than 1351*l.*, we learn from the governor, and his statement is corroborated by the chaplain³, that "the staff would be quite sufficient to carry on the duties of the prison in an efficient manner, even though 240 prisoners were admitted to it."⁴ In other words, the annual expense of the separate system as conducted at Reading would, assuming the number of prisoners to be equal in both cases, be little more than *one-half* of that incurred at Coldbath Fields, and scarcely a *third* of that occasioned by the four establishments in Surrey. Besides, as we have shown that the discipline of the silent system is infinitely more formidable and corrective than any that can be enforced on the associated principle, we may reasonably anticipate a large reduction in the number of offences; and if this be so, a proportional saving will be effected in the prosecution and maintenance of offenders. Add to this, that the severity of the punishment may well justify the infliction of shorter terms of imprisonment, which will, of course, occasion a decrease in the expense; and that, as the efficiency of the system becomes better understood, it will be unnecessary to resort so often, as at present, to the sterner punishment of transportation;—a punishment which is not only most costly, but which, from the extent to which it has of late years been carried, is

¹ Tenth Rep. of Insp. part i. pp. 426. 429.

² Id. pp. 546. 548. 569. 572. 590. 592. 603. 605.

³ Private Letter from Mr. Field.

⁴ Tenth Rep. of Insp. part i. p. 50.

calculated to embarrass in no slight degree the government of our Australian possessions. Let any man candidly consider these arguments, and give to them that weight, and that weight only, to which they are fairly entitled, and we would then ask him with entire confidence, whether he does not feel convinced, that the temporary outlay which would be occasioned by the introduction of the system would effect a permanent saving.

There are several other subjects connected with prison discipline to which, if our limits allowed, we would gladly advert. The abuse of having different rules and regulations enforced in our respective gaols requires speedy amendment; the wide disparity that exists at present between the salaries allowed in different counties to the governors and officers of our prisons should no longer be permitted; while the shameful difference in the cost of prison diet, which the returns from various parts of the country disclose, ranging as it does from 3*l.* 16*s.* 11*d.* per head per annum¹, to 7*l.* 18*s.* 8½*d.*², is a subject which demands immediate attention. In this case it is obvious that, like Benjamin and his brethren when they went to dine with Joseph, the one party must have a great deal too little, or the other a great deal too much.

But these, after all, are minor considerations. The main object for which we contend, is the uniform introduction of the separate system. It is this measure which will reflect historic honour on the government promoting it. It is this, which more than any social improvement that has been carried during the present century, will confer a lasting benefit on the country; it is this, which will justify the proud boast of England, that she is ever in advance of the civilization of the age. Let other nations rely upon severity alone,—*Ut metus ad omnes, pœna ad paucos, perveniret*; be it our duty to acknowledge and enforce the far more enlightened principle,—*Parum est improbos coercere pœnâ, nisi probos efficias disciplinâ.*

¹ Tenth Rep. of Insp. part iii. p. 119.; Exeter County House of Correction.

² Id. part i. p. 74.; Reading prison.

ART. X.—MR. JUSTICE WILLIAMS.

THE losses of our honoured profession are following in quick succession. After Sir William Follett had been taken from us, the tear for Chief Justice Tindal was not yet dried, when a yet more sudden fate deprived us of one of the most universally beloved members of the Law, one whose great and various accomplishments, and high station among the dignitaries of the Bench, are lost in the sentiment of regret for a man who may be truly said to have passed through life without a single enemy. Not that there was in him any indication of possessing the neutral, the unimportant character, the indiscriminate good nature, the general assentation which oftentimes makes middling men rather borne with than esteemed, and more liked than respected. No one had more clear and decided opinions than Mr. Justice Williams, —none ever thought more for himself, or acted more on his own convictions; few were less cautious in expressing an unpopular opinion, or took less care to conceal his unfavourable impressions of others, or was less disposed to tame down his expression of those sentiments, that they might be in harmony with those he was addressing. Far from affecting the character of Mr. Harmony, he was rather what might be called a good hater, but in the better sense of the phrase. For when he differed with you, he left no room to fancy he did so from the spirit of contradiction; and when he pronounced his condemnation of either a doctrine, or a person, or a class, there was no doubt that he did so conscientiously for the sake of truth, and not vainly from the love of singularity, —while in all he said, there prevailed a kindly nature, and appeared an honest purpose. Little wonder, then, is it if his society was most delightful, and his loss left a sad blank in the select circle he frequented. But we are anticipating in these reflections, which are drawn from us by the

sensation produced by his sudden death, and our reference to the sorrow it occasioned.

Sir John Williams was born in January, 1777, and was consequently within a few months of completing his seventieth year, when he died. Bunbury, near Tarporley, in Cheshire, was the place of his birth. His father was rector of the place, and there were, before him, two generations of clergymen, the grandfather and great-grandfather of the Judge, and he, as might be expected, though free from all bigotry, was a person of religious character, and regarded the Established Church with deep veneration, though with not the least intolerance towards those who dissented from her doctrines or discipline.

He received his classical education at a very excellent seminary of an extensive description in Manchester, and would often talk with much satisfaction of the eminent merits of Mr. Wright, its head master, a man of great learning, and uncommon powers of teaching. The lesser orations he would say with pride and pleasure, and then the Crown and the Embassy "we went through, and never turned our back upon a word or a phrase or an allusion,"—for, of course, none better than he knew that the great orator hardly ever uses an expression which is difficult; and yet the sense is to us so often difficult, that he may be pronounced one of the hardest of authors, inasmuch as a person shall give the meaning of each word separately, and yet be wholly unable to render the sense of the whole passage. The poets were attacked as unmercifully, and with equal success, as he himself has irrefragably proved by his exquisite verses. Under the tuition of this learned and honest teacher, he made the progress which it might be expected a scholar of great ability, intense application, singularly strong desire to learn, would make under so excellent a master.

From this seminary he proceeded to Cambridge, and was entered of Trinity College. He there pursued his studies, took a good degree, and, on leaving the University, was called to the bar in 1804. He immediately chose the great circuit, the Northern, at that time under the lead of Serjeant

Cockell, Mr. Park, and Mr. Topping; Mr. Scarlett and Mr. Raine being candidates for the succession should those leaders be promoted, or their health or their popularity fail. Mr. Williams brought with him the reputation of having diligently applied to pleading under Mr. John Atkinson, of Lincoln's Inn, who trained several good lawyers: he brought also the fame of a first-rate classical scholar. His admirable disposition soon ensured him the respect and esteem of all his fellows, and he very easily obtained a fair share of practice. The Sessions which he attended were those of Manchester and Preston, a sessions greater in business than several of the circuits; and he attended them several years before Mr. Scarlett quitted them.

As no men more speedily or more surely ascertain each others merits than the barristers, so it was soon found that he possessed abundantly some of the essential qualities which lead to success in our profession. He was a most diligent reader of his brief, never coming into court without the most perfect and most accurate knowledge of his case, nor ever turning to others, whether senior or junior, for supplying the defect of his own industry and care. He was most provident and circumspect in the conduct of a cause, whether he led or followed. He gave his whole mind to it, whatever was to be done. *Quicquid agas id pro virili agere* was his maxim, as he once cited it aloud in reference to a somewhat slipshod remark of the Judge (Mr. Justice Park), and in rebuke of that remark which had very absurdly charged him with taking too much pains. The quotation produced a great effect on those who heard it, and was often afterwards in their mouths. His examination in chief was greatly and deservedly admired, for it visited every corner of the witness's knowledge, obtained from him all he could give, and threw on each part of the case whatever light might come from him. His cross-examination was also powerful; and in re-examination he restored and set up his witness well and judiciously, and without overdoing it so as to excite suspicion, and thus lend to an adverse interrogatory a force and weight which did not belong to it. His speeches were truly admirable, concise, forcible, elegant in diction, dictated by the most correct taste, formed upon

the antique model with which no one was more familiarly acquainted. The feud arising out of the Queen's case long deprived him of the rank in his profession to which his merits and his practice entitled him ; for Mr. Brougham having, by the Queen's death, lost his precedence as her Majesty's Attorney General, Lord Eldon did not venture to continue his silk gown, for fear of displeasing the King, George IV. (a high-minded Sovereign, and very perfect gentleman), and therefore he was constrained to lead causes for six years without having along with him the eleven or twelve of the Circuit who were his seniors ; and the result was, that all of them, except Mr. Serjeant Hullock and Mr. Williams, were thrown out of business, in order to gratify the very dignified spite of a great Sovereign, and save his Chancellor the ten minutes' annoyance of thwarting his royal caprice. The same reason operated against giving Mr. Williams his rank, for he, too, had been one of her Majesty's counsel. And, though the King might very possibly have had no objection to promote him, provided his leaders in that great cause (Messrs. Brougham and Denman) remained clothed in stuff gowns, that would have created too loud an outcry at the Bar for the Chancellor's nerves ; so the result was, that none of them were promoted at all till the year 1827, when Mr. Brougham was, with much difficulty, prevailed upon by his friend Lord Lyndhurst, then Chancellor, to take a rank which had long ceased to be of the smallest importance to him ; and thus Mr. Williams, also, was at length promoted. But it was not till the year after that the magnanimous Monarch's personal dislike of Mr. Denman could be overcome ; and this act of tardy justice was due to the honesty and firmness of the Duke of Wellington, whom the " finest gentleman in Europe " and " first cavalry officer " could not resist.

The part which Mr. Williams bore in the Queen's case is too well known to require any commentary. He brought to that great occasion all the qualities for which we have shown that he was so eminently distinguished. The two parts of his most able and most useful advocacy which were most admired, were the cross-examination of Demont, one of the

Queen's waiting women, and the speech in which he, with little or no preparation, followed Mr. Brougham's opening of her Majesty's defence. The cross-examination was most successful, and it was destructive of that important witness's credit.¹ The effect of it in the Lords and in the country cannot easily be overrated. It completed, after the destruction of Majocchi, the ruin of the case. The speech of Mr. Williams must be divided into the first and the second day, and it is usual to call the former a failure, merely because it was delivered when the House were under the impression of the first speech, and did not expect a second to follow close upon it. But that first would in all probability have been as unsuccessful, had the order in which the two were delivered been reversed. It is in fact well known that Mr. Brougham, perceiving the favourable disposition of the House, ran out to call Mariette Bron, the Queen's own maid, whom he would have tendered for cross-examination after a question or two — and thus put an end to the case. But she was not to be found; and hence a suspicion very naturally arising that she had been gained over by the very active and skilful adversary, he never called her at all, but made Mr. Williams follow up the blow that had been struck. Whatever difference of opinion might exist on the first day's speech, no one ever doubted the great ability of the concluding portion delivered next morning, and its success was complete.

In 1823, Mr. Williams came into Parliament as member for the city of Lincoln, having before contested Chester unsuccessfully. The celebrated attack which he made upon Lord Eldon's administration of justice in the Court of Chancery needs not to be mentioned to show how completely successful this eminent advocate was in the House of Commons. There was no resisting his close, vigorous, and learned assault, and a compromise was the result of a drawn battle, if so we may term a motion that led to a Commission specially appointed to investigate the abuses in Chancery, and point out

¹ Some accounts erroneously give to Mr. J. Williams the cross-examination of Majocchi. That, of course, fell to the share of Mr. Brougham, for it was the pivot on which the whole case turned, and it could only be in the hands of the leader. But next in importance was Demont's,

the means of remedying the great evils complained of. The great and salutary reforms which have since been effected in that Court may be distinctly traced to this inquiry, that is, to Mr. Williams's motions.

In 1824, he distinguished himself in the great debate on Smith, the missionary's case, being one of the most powerful supporters of Mr. Brougham's motion, which is known ultimately to have obtained the emancipation of the Colonial Slaves. Mr. Denman and Dr. Lushington were the others who distinguished themselves on that great occasion, and to whom, with their colleagues, in equal shares, belongs the glory of this great victory for humanity and justice.

Mr. Williams never partook of the enthusiasm which made most of his political associates the advocates of free trade in all its branches, and in 1826 he delivered a speech of very remarkable ability, and great effect on the opposite side of the question. As he assailed Mr. Huskisson with much power of invective, Mr. Canning came to his friend's defence, and made a speech, in which the House might well be at a loss whether most to admire the orator's zeal for his friend when assailed, his carelessness about his own reputation as a reasoner, or his unscrupulous resort to topics forbidden by the ordinary rules of parliamentary warfare. For his arguments were as feeble as his vehemence was strong, and in want of other facts he hesitated not to jest upon one undeniable fact, namely, that Mr. Williams had recently married a Cheshire lady belonging to the county where manufacturers suffered from the new measures. This sally of delicate wit, and high bred politeness, was the more remarked, because it was delivered in the presence of that most estimable lady's father, an aged country gentleman, who always supported the government with which the wit was connected. This venerable person expressed in a few words, which made a deep impression, his disgust at what had passed. The fact was, that Mr. Williams's speech was an able one, and exasperated both Mr. Huskisson and Mr. Canning.

Our narrative has thus led to the mention of this connexion with Mr. Davenport's family, a connexion which formed the happiness of Mr. Williams's after life, for he had found a friend and companion of admirable judgment, sterling sense,

and agreeable manners, the ornament of the exalted circle in which she moved.

In 1830, on the accession of his party to power, he filled the office of Queen's Attorney General, with Mr. Pepys (now Lord Cottenham) as Solicitor General, until the year 1832, when the determination being taken to resign with the Ministers on account of the King's refusal to make Peers for passing the Reform Bill; Messrs. Williams and Pepys' resignation was suddenly accepted, and on the Ministers resuming their places, these two gentlemen found that her Majesty had appointed other law officers in their room. The reason assigned for this somewhat cavalier proceeding was, that it was resolved no longer to have Law officers of the Queen who were in Parliament. The emoluments of these places are moderate, the Attorney General having 240*l.*, and the Solicitor only 180*l.* salary, the rank of junior King's counsel which they enjoy, that is after all the others, could be of no use to Messrs. Williams and Pepys, who already had silk gowns.

Early in 1834, upon Mr. Justice Parke removing to succeed Mr. Baron Bayley, in the Court of Exchequer, Mr. Williams was appointed a puisne Judge of the King's Bench, which important place he filled for twelve years and upwards. His private fortune, augmented by that of his wife, was ample, and the fatigues, especially of the Circuits and the Old Bailey, frequently made him contemplate a retirement, which the remonstrances of his learned brethren, added to his own love of the profession and professional society, prevented, or at least, postponed. His health, too, suffered no interruption, and he had none of the infirmities which advancing years so often bring along with them. He continued to indulge in field sports, always with him a favourite relaxation, and his early mornings were passed according to his ancient and invariable habit on horseback. For the Chief Justice, and his other parliamentary friends, before he had a seat himself, used to be frequently amused by meeting him on his morning ride, as they were returning from enjoying the "*fumum strepitumque*" of the Commons; we should add the "*opes*," on Lord Tenterden's authority, who, comment-

ing on a very ill drawn statute, which he was forced to construe, observed that Parliament could not, indeed, be called "inops consilii," but it was certainly "magnas inter opes inops."

His other relaxations were the classical studies, for which he ever had so keen a relish, and which to the last he pursued with such eminent success. The Greek epigrams (or inscriptions) which he composed at different times have been before the world for some years, being printed by himself in a small volume of *Nugæ Metricæ*, after the venerable example of Lord Grenville, who sent him a copy of his work on seeing the Epigram (Epitaph) on Napoleon, beginning, *Τολμαν Αλεξανδρου*, and the Inscription on the Apollo Belvedere, beginning *Ουρανιων κλιματων συλλησας*. All who have seen these exquisite compositions have pronounced upon them the most favourable judgment; some, however, preferring the Apollo, while others more admire the one on Lord Byron while serving in Greece. An English translation of the Apollo was made by Mr. Baron Alderson, the first lines of which are peculiarly successful:—

"If old Prometheus stole the fire divine,
What was his daring when compared with thine?
He but inspired with life the senseless clod,
While thou hast of the marble made a god!"

Nothing can be more close or more happy. The present Earl of Carlisle (*παν φιλομουσος Ανηρ*) almost off-hand rendered the Napoleon,—for he received it, and by the same day's post sent off his translation,—so that no doubt could remain of the quickness with which his work was accomplished. It thus concludes; but first we must give the original lines:

*Ουδεν εμοι τυμβον; δεσ δ' ω ξε' αντι Λιβου,
Έσπεριην, Ιστρον, Πυραμιδας, Σκυθιην —*

"Quid mihi cum tumulo? Tumuli vice Padus et Ister,
Aëriæque Alpes, Sarmatiæque nives!"

Nothing can be more perfect than such workmanship as this. When the friend who had sent Lord Carlisle the epigram gave Mr. Justice Williams the version, it drew from him an exclamation very much in his mouth, favourable

to the accomplishments of our aristocracy, and the uses of educating them at public schools. His Lordship is one of the many ornaments of Eton. Of his brother Judge's lines he likewise had a high opinion; but he conceived them to be less sustained than Lord Carlisle's.

There are some very able papers of his in the *Edinburgh Review*, especially one on the Greek orators, in 1821. We may also mention that he was the author of the Article on "Capital Punishments" in the third volume of this work, No. V., and also of the memoirs of Mr. Baron Bayley, and Mr. Commissioner Boteler, in our first and third volumes.¹

But it is time we should speak of this eminent person's judicial attainments; and we begin by stating, that with an abundant provision of legal learning, and practical knowledge of the profession for all ordinary occasions, and a perfectly legal understanding, he yet did not pretend to the acquirements of the profounder black-letter lawyer, to the legal genius of Holroyd, or the universal learning of Mr. Commissioner Evans. But he dealt most felicitously with facts: how complicated soever, he clearly perceived the bearing upon them of the law, and he closely and correctly applied it to them. His acquaintance with criminal and sessions' law, and all proceedings in its administration, was extensive and profound. No man ever had a larger experience in it, for he had been the leader in the great Lancashire Sessions nearly twenty years, and had been more consulted on such cases than any man of his day. As a criminal Judge, he was at once perfectly firm and humane in an exemplary degree. But one of his most learned and able brethren, when writing respecting his death, having heard a eulogy of him confined rather to his capacity as a criminal judge, protested against any such restriction, and said decidedly that the country had lost one of her best Judges. A quality which he possessed in an eminent degree, and we hope we shall neither be charged

¹ Mr. Justice Williams enjoyed a good fortune, and he made a most liberal use of it. His purse was always open to his friends. To one of them he advanced at different times, without any security, and, indeed, wholly careless of repayment, a sum between nine and ten thousand pounds.

with truism nor with paradox, when we praise him for it—was constant and inflexible love of justice. All judges in this country are, in one sense, strictly just, because corruption is unknown to them; but all are not equally patient, equally calm, equally free from personal feelings towards advocates, equally exempt from the bias of party and of sect. The excellent person of whom we now speak was a model in these essential particulars, which, as our tribunals are constituted, go to make up that exalted character, the perfectly just Judge. In Banc his attention was ever awake, and his diligence was always at the command of the suitor and the court. At Nisi Prius, he distinguished himself as might be expected from one of his long experience and great merits. In the House of Lords his judgments, where there arose a difference of opinion, were justly admired for the close texture of the argument, and the uniform rejection of all extraneous matter.

While we perform the melancholy office of doing justice to one who never withheld it from others, (for no human being was ever more exempt from the vices of jealousy, envy, vanity, and pride, which too often disfigure great talents and acquirements,) we have a pleasing recollection of the aid which this distinguished Judge condescended to lend our humble labours, moved, as was his wont, by zeal for the improvement of the law, and an honest desire ever to travel onward in quest of truth.

He was a reformer both in politics and in jurisprudence, of a moderate and very cautious description, desiring strongly the extirpation of abuse and furtherance of improvements, but most anxious that all changes should be effected in deference to reason only, and not under the pressure of popular violence; above every thing, requiring that they should be in the hands of the enlightened few, and not in those of the ignorant multitude. He was most friendly, therefore, to the Society for the Amendment of the Law, and only withheld from belonging to it by the sense of the inconvenience that might arise out of his duties as a member and as a judge.

Mr. Justice Williams' death was extremely sudden. He had passed the shooting season with his valued friends,

Mr. and Lady Augusta Milbanke, at the Yorkshire Moors, a family with which he had long been connected, having sat for some years for a borough of the Duke of Cleveland, her Ladyship's father. From thence he went to pass a week with Lord Brougham in Westmoreland. While there he felt a sharp pain in the chest, but this was only mentioned afterwards, for he never spoke of it at Brougham. On his way through London to his residence in Suffolk he consulted his physicians, who considered it as connected with the liver, and of no grave importance. On his arrival at his seat he was seemingly quite well, and went out daily to shoot. After a week or ten days, he was, on the 14th of September, somewhat indisposed, but had been out riding before breakfast. He did not dine at table, there being some visitors there. Lady Williams left him pretty well in the drawing-room, and returned after dinner, but before the company retired from table. She found him apparently well, and playing with her lap-dog. She went to the dining-room, and came back for the dog in three, or, at the most, four minutes after she had left him well. No sooner did she open the drawing-room door than the animal set up a loud bark, and rushed past her violently, barking and howling all the way. She asked him what ailed the dog, but received no answer. She repeated the question, and seeing him, as she thought, asleep, called his servant to see if his head was not too low. The man said "No,—he is sleeping comfortably." She approached him, and again asked him to speak. She observed one eye nearly open, the other half closed, but his colour as usual. The servant and another thought still that he slept, but her Ladyship felt sure he was gone. So it proved, for he speedily became cold and pale, nor could any of the remedies that were applied restore him. He had complained when he awoke just before dinner that he had in his sleep dreamt of a sword piercing his breast. The examination of the body proved only that all the nobler parts, both head, chest, and abdomen, were in a state of perfect health, except a very slight enlargement of the spleen and liver, of no moment. He never had gout, nor had any of his family.

We have entered into this detail on account of the very remarkable circumstance of the dog's instinct. It is quite clear that the poor animal was aware of the fatal change some time before any observer of our own species could discover that the spirit of its master had passed from this world. Many stories have been told of such an instinctive sense, but it has never before, we believe, been established on more irrefragable evidence as the facts above detailed constitute. We may add, that if the examination of the body is to be relied on, an additional argument is presented by this case in favour of the theory which holds the ossification of the coronary arteries to be symptomatic or consequential in *angina pectoris*, and not the cause of that painful and fatal malady; for, in the first instance, the spasms not having been of long standing, these reasoners may argue that time had not been afforded for the process of ossification, which their doctrine assumes to be the effect, and not the cause, of the spasm.

ART. XI. — THE NEW COUNTY COURTS.

The New County Courts Act, 9 & 10 Vict. c. 95., for Debts, Damages, Replevin, &c. With Notes. By HENRY UDALL, of the Inner Temple, Barrister-at-Law. Stevens & Norton. 1846.

THIS act is an attempt to establish what has for some time been much desired, a local administration of justice. As it now stands the act may be imperfect, although it appears to us a large instalment; and when we consider how long and how earnestly a measure of this sort has been wished for, and how bitterly and how successfully it has been opposed, we cannot but consider that a great victory has been obtained in placing this act upon the statute book. But the merit of this victory does not belong to any particular party in the state, since all were agreed in the principle of the measure. It is a victory over prejudice and interested opposition. This bill was in fact brought in by Sir Robert Peel's government, and was

carried by Lord John Russell's. We have no intention of tracing the history of the measure. It is sufficient to say that during the present century repeated attempts have been made to complete and revive the jurisdiction of the County Courts. These have assumed various aspects, the proposed courts have had a jurisdiction assigned to them, varying in its amount and in its nature. Its support is identified with many statesmen, among whom we need only mention Lord Althorp, Sir Robert Peel, and Lord Brougham; at last, after a constant conflict of a quarter of a century, and the partial application of the principle to various particular localities, a general "act for the more easy recovery of small debts and demands" has been passed.

As we have from the first¹ asserted the necessity of this measure, we shall not only consider it our duty to give a pretty full account of these new courts which are to be established throughout the country, but we shall also from time to time endeavour to assist the operation of the act. Difficulties will arise, we doubt not, some of which have been foreseen, others which must in the nature of things have escaped the most careful forethought. On the whole, considering the extent of the measure, we think it entitled to great praise.

When we say that some measure of this sort was necessary, we think this cannot be put in a clearer light than by a parliamentary return of last session, which gives the number of writs of summons issued from the 10th of November to the 10th of May, 1841, to 1846 inclusive, by which it appears that on the average, about 27,000 writs were issued in this period of the year out of the Queen's Bench, 11,000 out of the Common Pleas, and 30,000 out of the Exchequer, making a total of 68,000 in the half year. It cannot be doubted that more than one half of these, or 34,000 writs were issued for demands under 20*l*. Now, we believe, that the necessary expenses of an action at law in the superior courts, if carried to trial, are never less than from 5*l*. to 10*l*. Surely, then, this was too serious a deduction from 20*l*. or less. It is true, that very few of these actions proceeded to trial, but

¹ See L. R. i. 10.

the expense of the writ of summons¹ was incurred in all, and in many more that of the pleadings was added, and these it will be found made a very considerable deduction from the amount recovered.

But an attempt was first made under the Law Amendment Act to lessen the expense of actions under 20*l.* by sending them to be tried by the Under Sheriff. Mr. Udall explains why this has failed.

"Many persons have considered that the practical remedy for the complaint of delays in Westminster Hall was the extension of the power existing under that clause. If it be asked why this remedy, by extending the powers contained in that section, has not been applied, the answer is obvious—the tribunal to which the cases are sent is defective, it wants judicial strength. There are particular exceptions; but as a whole it is quite incapable for the judicial duties to which it is applied. No person can be in Westminster Hall for one term without seeing this, in the continued complaints that are made of the tribunal, and in the numerous applications for new trials rendered necessary by the want of even an elementary knowledge of legal principles. Besides the want of legal knowledge, so glaringly apparent, the grievance is increased by the incapacity shown of taking a proper note of the evidence given. This part of the judicial duty is generally so badly performed, that even if a verdict be right and given on sufficient evidence, no record remains of the really important part on which it has been given. But the want of judicial strength is in nothing so much shown as in the absence of a connected statement of the charge to the jury. In the majority of these notes returned to the Court nothing is said of the charge at all. In fact the judge is afraid to put it, for he has so often found that what he has before said has been declared not to be law, that he distrusts his own opinion, and the necessary courage to state it is gone." (p. 5.)

Let us observe, in the first place, that it is not necessary that the act should come into operation throughout the whole country all at once; for it is provided by the first section that the Queen, with the advice of the Privy Council, may

¹ Letter before action, 3*s.* 6*d.*; instructions to sue, 6*s.* 8*d.*; writ of summons, 14*s.* 6*d.*, &c. Richards on Costs, p. 53.

“from time to time order that this act shall be put in force in such county or counties as to Her Majesty shall seem fit.” For the purpose of putting the act into operation, the Queen may (s. 2.) with the advice aforesaid, divide the whole or any part of any such county into districts, and order that the County Courts shall be holden for the recovery of debts and demands under the act in each of such districts; and if it shall appear that any part of any county, city or borough may conveniently be declared within the jurisdiction of the county court of an adjoining county, the Queen may “order that such part shall be taken to be within the jurisdiction of the county court holden for the purposes of this act for such adjoining county.”

The orders in council made for the purposes of this act are to be published in the *London Gazette*, and notice of the intention of the Queen to take into consideration the propriety of making any such order, shall be published in the *London Gazette one calendar month at least before such order shall be made.* (s. 8.)

It is also to be observed that provision (s. 5. 7.) is made respecting those Small Debt Courts which have been already established, which are enumerated in the schedules A. and B. The main object of these provisions is, to establish a uniform administration of justice in all Small Debt Courts, whether established previously or subsequently to the act.

We shall now, without noticing all the doubts which have been raised on some clauses in the act (many of which are hypercritical), endeavour to give our readers some idea of these new courts; and we shall consider, —

- I. THE COURT. 2. Its Jurisdiction. 3. Court Houses, Offices, and Prisons.
- II. THE JUDGES AND OTHER OFFICERS. 1. The Judge. 2. The Clerk. 3. The Treasurer, &c. 4. Fees and Salaries. 5. Actions against Officers.
- III. THE PRACTICE AND PROCEEDINGS OF THE COURT. 1. Summons and Trial. 2. Costs, Judgment and Execution. 3. Removal of Plaints. 4. Concurrent Jurisdiction. 5. Penalties and Fines.

I. THE COURT.

1. *The Court.* — Every Court under the Act is a Court of Record (s. 2.), and shall have all the jurisdiction and powers of the County Court, as altered by the act. (s. 2.)

“Making these courts of record,” says Mr. Udall, “is a most important improvement over the county courts at common law. The county court was not a court of record (Comyn’s Digest, County, c. 2.), except in the old proceeding by re-disseisin, in which instance the sheriff was judge instead of the suitors. (Jentleman’s case, 6 Co. Rep. 11 b.) Not being a court of record, it could not punish those classes of contempts which consist in obstructing, preventing, and defeating the authority of the court and the ends of justice by acts done when the court was not sitting. It could, at the utmost, only punish for those contempts done in the face of the court, and then only up to the time of the rising of the court. And therefore, although it could issue a subpoena to obtain the attendance of witnesses, it was little better than a useless form, as it could not proceed to enforce the subpoena by fine and imprisonment, the only remedy to the party injured by non-attendance being by action on the case.” (p. 5.)

Her Majesty may order any court under the Acts cited in the schedules (A.) and (B.) to be held as a county court, and may assign a district to the same. (s. 5.) And when a court shall be established under this act, the recited acts (7 & 8 Vict. c. 96., and 8 & 9 Vict. c. 127.), and all other acts affecting its jurisdiction, shall be repealed. (s. 6.) But proceedings under the former acts are to be deemed valid. (s. 7.)

It is to be observed that no court is to be established under this act in the city of London (s. 1.); and the act is not to affect the rights of the Universities of Oxford and Cambridge (s. 140.), nor the courts of the Warden of the Stannaries. (s. 141.)

2. *Its Jurisdiction.* — All pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the court without writ; but the court is not to take cognizance of actions of ejectment, or in which the title to hereditaments, tolls, fairs, markets, or franchises shall be in question, or in which the validity of any devise, bequest, or limitation, under a will or settlement, may be disputed; or any malicious prosecution; or for libel or slander; or for *crim. con.*, seduction, or breach of promise of marriage. (s. 58.)

“The proviso,” says Mr. Udall, “takes away many important classes of action. To most of these, such as libel, slander, &c., as

the subject to be litigated would be apparent in the plaint, there will be no difficulty in preventing such actions being entertained. This, however, is not applicable to the whole proviso. Take the instance of a defence that involves title. Supposing an action to be brought for rent. It will be impossible to foresee, in many cases, whether the title will come into question or not. The defence may be, that the plaintiff is not the person to whom the rent is due. This may involve the question at large, whether a will is operative or not; but it may not have been known to the plaintiff that such a question would arise before he comes into court for the trial. And cases will continually occur where it will not be apparent, even at the commencement of the trial. Take the case of trespass to land, in which there are two defences: the action may have lasted hours before it is discovered that it depends on the question whether the plaintiff has a sufficient possession to enable him to maintain trespass. And what is to be done when, during the trial, it comes out that title is in question? Is the plaintiff to be nonsuited? There is, moreover, this difficulty: who is to take the objection that title is in question? Supposing neither party does so, or that the parties even consent that the cause shall go on, the judgment cannot be legally enforced: consent gives no jurisdiction. If any authority were wanted for this, the several cases that have arisen upon the very point, under the writ of trial clause of the Law Amendment Act would be applicable. It may be as well to refer to one (*Lawrence v. Wilcock*, 11 A. & E. 941.), in which most of the cases will be found cited. It is to be regretted that no special directions are given for the course to be pursued when title comes in question for the first time during the trial of the cause. Perhaps it would also have been better to have enacted that the judgment should be legal, *unless the objection to the jurisdiction were taken before verdict*. This is the difficulty on one side: on the other, it will not do to allow a mere vague declaration of defendant, that title is in question to oust the court of its jurisdiction, and the plaintiff of his speedy judgment. Here, again, it would have been convenient to have provided what should be deemed satisfactory proof that title was in question. Supposing the court to go on after the title is in question, and to give judgment, the court above, on this being satisfactorily made out, would, it is presumed, grant a writ of prohibition, and it is said that this could be done even after execution, *per Alderson B., Roberts v. Humby*, 3 M. & W. 123—127.; otherwise, as that learned judge said, there would be no remedy where the judgment and execution issue when the superior courts are not sitting.

Where the claim is under 5*l.*, and the court is proceeding without jurisdiction, it appears that the cause could only be stopped by prohibition, as unless the debt or damage claimed exceed 5*l.*, the section 90. deprives the judges of the superior courts of the power to remove." (p. 41, 42.)

One of several persons jointly answerable may be sued; and such person may obtain contribution from the others jointly liable. (s. 68.) But demands are not to be divided for the purpose of bringing two or more suits. (s. 63.)

The unliquidated balance of a partnership account, or a share under an intestacy, or a legacy not exceeding 20*l.* under a will, may be recovered (s. 65.); minors may also sue for wages, or for piece work (s. 64.); and executors may sue and be sued (s. 66.) all actions of replevin shall be brought without writ (s. 119.); and in such actions plaints may be entered. (s. 120.)

Possession of small tenements may be recovered by plaint; and if the tenant neglect to appear, or refuse to give possession, the judge may, on proof of service of summons, issue a warrant to enforce the same. (s. 122.)

Parties having obtained an unsatisfied judgment in any court under the act may obtain a summons on a charge of fraud against the defendant in contracting the debt, his means and expectation of payment, &c. (s. 98.); with power to the court, in case fraud shall be proved, to commit (s. 99.) for any period not exceeding forty days, and to rescind or alter the order. (s. 100.) Power is also given to the court to examine and commit at the hearing of the cause (s. 101.) and the mode of issuing and executing warrants of commitment is prescribed (s. 102.); but it is provided that imprisonment shall not operate as a satisfaction for the debt. (s. 103.)

3. *Court Houses, Offices, and Prisons.*—The treasurer is, with the approval of the Secretary of State, to provide court-houses, offices, &c. (s. 48.); and where the common gaols are inconvenient, prisons belonging to courts under the Acts cited in schedules (A.) and (B.) may be used, according to the provisions of 5 & 6 Vict. c. 98. (s. 49.)

The provisions of the Lands Clauses Consolidation Act for purchasing land shall apply to the purchase of land for the purposes of this act, and the treasurer is empowered to borrow money for similar purposes. (s. 51.) A general fund is to be raised for paying off money borrowed. (s. 52.) The property of the Courts in schedule (A.) and (B.) is to vest in the treasurer (s. 53.); and provision is made for outstanding liabilities. (s. 54.)

4. *Actions against Officers.*—Actions against persons for

proceedings in execution of the act are limited to three months (138.); and in case the damages found are not more than 20*l.*, no costs shall be awarded. (s. 139.)

II. THE JUDGES AND OTHER OFFICERS OF THE COURT.

1. *The Judge.*—A Judge is to be appointed for each district under the Act. (s. 2.) Such Judges are to be appointed by the Lord Chancellor, “each of whom shall be a barrister-at-law, who shall be of seven years’ standing, or who shall have practised as a barrister and special pleader for at least seven years.” This is to be the qualification under the Act: barristers or attorneys who have been already appointed judges under the acts mentioned in the schedule, or 7 & 8 Vict. c. 96, and 8 & 9 Vict. c. 127., are also eligible; but an attorney appointed a judge, must cease to practise either by himself or his partner, either directly or indirectly. (s. 9.) When any judge appointed under the Act shall die, resign, or be removed, and the district for which he was appointed shall not be consolidated with any other district, another judge shall be appointed who shall be a barrister of seven years’ standing, or shall have practised as a barrister or special pleader for seven years, “or who shall have been the county clerk of the same county at the time of the passing of this act.” This appointment is to be made by the Lord Chancellor, or where the whole district is within the Duchy of the Court of Lancaster, by the Chancellor of that Duchy. (s. 16.) No judge (with some special local exceptions) appointed under this act shall, during his continuance as such judge practise as a barrister within the district for which his court is holden; but any barrister appointed, “*now* practising in chambers as conveyancing counsel, may continue such practice.” (s. 17.) By s. 18., it shall be lawful for the Lord Chancellor, or when the whole district is within the Duchy of Lancaster, for the Chancellor of that Duchy, “if he shall think fit to remove for inability or misbehaviour, any such judge already appointed or hereafter to be appointed.” It shall also be lawful (s. 19.) for the Lord Chancellor or the Chancellor of the Duchy within their several jurisdictions, “to remove any judge from any district to which he shall have been appointed for the purpose of appointing him to any other district in which the salary of such judge shall not be less than in the district from which he shall be so removed.” Every judge “in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the court,” or if the

judge shall be unable, the Lord Chancellor, or Chancellor of the Duchy of Lancaster may appoint some person who shall be a judge appointed under the act, or who shall have practised as a barrister for three years, or as an attorney for ten years, to act as deputy; and any judge may also with the approval of the Lord Chancellor or Chancellor of the Duchy appoint a deputy having the same qualification, except that an attorney is here not eligible "to act for him for any time or times not exceeding in the whole two calendar months in any consecutive period of twelve calendar months." (s. 20.) Every Judge may act as justice of the peace if in the commission, although he has not any other qualification. (s. 21.)

Section 22. points to other duties which are to be performed by the Judges other than those mentioned in the act. It provides that the Judges and other officers "shall be authorised and required to perform all such duties in or relating to any causes or matters depending in the High Court of Chancery, or before any judge thereof, or before the Lord Chancellor in the exercise of any authority belonging to him necessary or proper to be done in their respective districts, as the Lord Chancellor shall from time to time by any general order direct, and for this purpose and subject to the general rules of the court, shall exercise all such authorities as may be duly exercised by the commissioners or other officers of the said court by whom such duties are now usually performed." The words of this clause are extensive, and it may be intended under them to establish a scheme for the departmental administration of justice which may embrace inquiries relating to matters of equity (including small charities), bankruptcy, and lunacy.

2. *The Clerk of the Court.*—The appointment of these officers is vested in the Judges, subject to the approval of the Lord Chancellor (s. 24.); and in populous districts the Lord Chancellor may direct two clerks to be appointed. (s. 25.) In case of illness or unavoidable absence, the clerk may appoint a deputy with the approbation of the Judge. (s. 26.) The clerk is to issue the process of the court, to register the orders and judgments of the court, to keep an account of all the proceedings of the court, of all fees and monies, and submit his accounts to be audited by the treasurer. The offices of clerk, treasurer, and bailiff, are not to be conjoined. (s. 28.) No officer is to act as an attorney of the court (s. 29.); and a penalty of 50*l.* is inflicted for the non-observance of either of these two last enactments. (s. 30.) The clerk is to have the charge of the court-houses and offices, and is empowered to appoint and dismiss servants. (s. 55.)

3. *Treasurer and other Officers.* — The commissioners of the treasury are authorised to appoint and remove treasurers of the courts to be holden under this act. (s. 23.)

The Judge is to appoint and remove one or more high bailiffs of the court, and the high bailiff may appoint a sufficient number of bailiffs to assist him and remove them. (s. 31.)

The duties of the bailiff are to attend every sitting of the court, to serve the summonses and orders, and execute all warrants, precepts, and writs; he is to be paid by the fees provided for him by the act, and is to be responsible for all acts and defaults in like manner as the sheriff. (s. 33.) By s. 36. the clerks, treasurers, and high bailiffs are required to give security for the performance of their offices and payment of all monies received.

Fees and Salaries. — The table of fees to be taken is given in schedule (D.), and this table is to be exhibited in conspicuous places, in and near the court. The amount of the fees may be reduced. (s. 37.)

The amount of salaries to be paid under this act is limited as follows:—1200*l.* to the Judge; 600*l.* to the clerk, excepting the case of the Judges and clerks of the courts in schedule (A.), and travelling expenses. (s. 40.) The fees and fines are to be accounted for to the treasurer (s. 41.); and the clerk's accounts are to be audited and settled by the treasurer. (s. 42.) The treasurer of the court is to render his accounts to the commissioners of audit (s. 43.); and the commissioners of the treasury are to direct how the balances shall be applied. (s. 44.) The clerk is to send to the commissioners of audit an account of all sums paid by him to the treasurer (s. 46.); and the accounts, when audited, are to be sent to the treasurer. (s. 47.) The suitors' money, if unclaimed in six years, is to be applied as part of the general fund of the court. (s. 112.)

III. THE PRACTICE AND PROCEEDINGS OF THE COURT.

The forms of procedure in the courts are to be settled by five of the Judges of the superior courts. (s. 78.) It is not said which five, but one of them must be a Chief Justice or Baron.

1. *Summons and Trial.*—The Judge is to hold the court where Her Majesty shall direct once at least in every calendar month, and notices of the days for holding the courts are to be put up in conspicuous places. (s. 56.)

Every court is to have a seal, and the process of the court is to be under the seal of the court. (s. 57.)

The mode of proceeding is regulated by s. 59., and is as follows:—A person desirous of bringing a suit under the act is to apply to the clerk of the court, who is to enter in a book kept for the purpose, a plaint in writing, stating the names and last-known places of abode of the parties, and the substance of the action; every such plaint is to be numbered according to the order of its entry, and a summons stating the substance of the action, and bearing the number of the plaint on its margin, is to issue under seal, according to such form, and to be served on the defendant so many days before trial as shall be directed by the rules of practice to be made. The delivery of this summons to the defendant, or in such other manner as shall be specified, shall be deemed good service. No misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known. A summons may be issued, though the cause of action may not arise in the district (s. 60.), and processes out of the district of the court may be served by the bailiff of any other court. (s. 61.) Provision is made for proof of service of process out of the district, or in the absence of the bailiff. (s. 62.) The Judge alone may determine all questions, as well of law as of fact, unless a jury be summoned. (s. 69.)

In all actions where the amount claimed shall exceed 5*l.*, the plaintiff or defendant may require a jury. (s. 70.) The party requiring a jury is to make a deposit. (s. 71.) The number of the jury is limited to five. (s. 73.)

No person shall be entitled to appear for any other party to any proceeding, unless he be an attorney of one of the superior courts, or a barrister at law instructed by such attorney, or "*by leave of the judge*" any other person allowed by the judge to appear instead of the party, but no barrister, attorney, or other person, except by leave of the judge, shall be entitled to be heard to argue any question as counsel for any other person in any proceeding in any court holden under this Act. And no person, being an attorney, shall be entitled to recover any sum for appearing or acting on behalf of any other person; and no attorney shall be entitled to any sum, unless the debt or damage claimed be more than 40*s.*, or to have more than 10*s.* for his fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case; and in no case shall any fee, exceeding 1*l.* 3*s.* 6*d.*,

be allowed for employing a barrister as counsel in the cause, and the expense of employing a barrister or an attorney, either by plaintiff or defendant, shall not be allowed on taxation of costs in the case of a plaintiff when less than five pounds is recovered, or in the case of a defendant when less than five pounds, or *in any case unless by order of the judge.* (s. 91.)

Notice must be given by the defendant of the following defences, (unless the plaintiff shall waive it,) set off, infancy, coverture, any statute of limitations, the discharge of the defendant under any statute relating to bankrupts, or for relief of insolvent debtors. The clerk of the court, on receiving the notice, is to communicate the same to the plaintiff by the post; or by causing the same to be delivered at his usual place of abode. (s. 76.)

On the day of hearing the plaint, the judge shall proceed in a summary way and give judgment without further pleading or formal joinder of issue. (s. 74.)

No evidence is to be given of any demand that is not in the summons. (s. 75.) But by s. 83. an important extension of the rules as to evidence is made with respect to actions in this court, it being enacted that the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant. Parties giving false evidence are to be deemed guilty of perjury.

Suits may be settled by arbitration, and the reference shall not be revoked by either party, except by consent of the judge (s. 77); and the judge may grant time to either party, and may adjourn the hearing in such manner as he may see fit. (s. 81.) The defendant may pay money into court, and notice of such payment is to be given to the plaintiff. (s. 82.)

The clerk of the court may issue summonses to witnesses (s. 85.), and a penalty is inflicted on witnesses neglecting to attend. (s. 86.)

The course of proceeding in case the plaintiff does not appear or prove his case is prescribed by s. 79., or where the defendant does not appear, by s. 80.

2. *Costs — Judgment — and Execution.* The costs of any action, not otherwise provided for, are to abide the event. (s. 88.)

The judgment is to be final, unless the court direct a new trial. (s. 89.) The court may make orders for payment of the debt or damages by instalments (s. 92.), and, in case of cross judgments, deduct the smaller sum and let execution for the remainder be issued. (s. 93.)

Execution is not to issue till after default in payment of some instalment, and then it may issue for the whole sum due. (s. 95.)

The court may award execution against the goods. (s. 94.) The effects which may be taken in execution include money and securities for money, but not wearing apparel, bedding, or tools, to the value of 5*l.* (s. 96.) The securities so seized are to be held by the high bailiff for the benefit of the plaintiff, who may sue in the defendant's name. (s. 97.) Execution may be had out of the jurisdiction of the court in the manner prescribed by s. 104., with power to the Judge to suspend execution. (s. 105.) The sale of the goods taken in execution is regulated by s. 106.

Claims as to goods taken in execution are to be adjudicated in the county court. (s. 118.) Provision is also made regarding the liability of goods taken in execution under 8 Anne, c. 17. Landlords may claim rents in arrear for a limited period, and bailiffs making levies may distrain for rent and costs. (s. 107.) No execution can be stayed by writ of error. (s. 108.) But the execution is to be superseded on payment of the debt and costs. (s. 109.), and the debtor, on such payment, is to be discharged. (s. 110.)

3. *Removal of Plaints.*—No plaint can be removed to a superior court, unless the debt or damage claimed exceed 5*l.*, and then only by leave of the Judge of the superior court, on such terms, as to payment of costs, giving security for debt or costs, or such other terms, as he shall think fit. (s. 90.)

4. *Concurrent Jurisdiction.*—The concurrent jurisdiction of the superior courts is retained where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business, or where an officer of the court is a party. (s. 128.)

If an action be commenced in a superior court, except as last mentioned, and a verdict be found for less than 20*l.*, if the action be founded on a contract, or less than 5*l.*, if founded on *tort*, the plaintiff shall have judgment but no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between solicitor and client, unless in either case the Judge shall certify that the action was fit to be brought in the superior court. (s. 129.) This section preserves the jurisdiction of the superior courts.

5. *Penalties and Fines.*—Power of committal for contempt of court is given by the 113th section, and a penalty is inflicted for

assaulting bailiffs, or rescuing goods taken in execution. (s. 114.) The bailiffs are made answerable for escapes and neglect to levy execution (s. 115.), and remedies are provided against, and penalties inflicted on bailiffs and other officers for misconduct (s. 116.), and on officers for taking fees besides those allowed. (s. 117.)

The payment of any fine is to be enforced in like manner as the payment of any debt adjudged in the court. (s. 87.) Penalties and costs may be recovered before a justice, and levied by distress. (s. 130.) In default of security, the offender may be detained till return of warrant of distress (s. 131.); and in default of sufficient distress, the offender may be committed to gaol for any time not exceeding three months. (s. 132.) Penalties not otherwise applied, are to be paid into the general fund. (s. 133.) Justices may proceed by summons in the recovery of penalties (s. 134.): a form of conviction is given in s. 135.; but the proceedings are not to be invalid for want of form (s. 136.); neither is a distress by virtue of this act. (s. 137.)

The reader has now a summary of the provisions of this act before him. He will see that it is an extensive scheme. It is, in fact, a great experiment: it must be admitted, that it breaks in upon many of our established notions. Neither will it be an easy act to carry into execution. A new practice has not only to be framed, but to be acted on. The whole range of the common law, with some few exceptions, is to be dealt with by these courts; and in the back-ground appears the possibility of additional duties in equity and bankruptcy. In the Judges no mean capacity, no small share of judgment and learning, no trifling acquaintance with mankind will be required. We do not, however, despond: if properly worked, these courts will be a great instrument of extending justice throughout the land, placing millions under the protection of the law, from which they are now practically excluded. The act is a measure demanded by the absolute wants of the time, and it was necessary that the attempt should be made. We believe, further, that the profession is fully adequate to meet the demand that will be made upon it for Judges; and that there is the proper disposition on the part of the government to consider the measure, not as a mere piece of ordinary patronage, but to secure the best services that can be obtained.

The most difficult question raised by the act in some quarters, is one which we are not at all desirous of avoiding. What effect is it to have on the profits of the profession? Now we are by no means indifferent to those profits. It is for the interest of the public that the profession should be supported in a proper position. The best services must be secured by the usual inducements; a competent, trustworthy, and honest body of practitioners must be supported. On behalf of the public, and on behalf of ourselves as practitioners in various ranks and departments of the profession, we make this demand. If then this act will injure the profession in this respect, it will do harm to the public and not good. The question is, will it have this effect? The fees provided both for counsel and attorney are low. Are they so low as to exclude the necessary and proper class of practitioners? But this brings us to another question. What is the present state of the profession in all its branches? Is it a satisfactory one to the majority? Is it not notorious, that the great bulk of both branches have little or nothing to do? How then can this act injure the great majority? That it may deprive some of the circuits of some of their business is quite possible. That it may injure some of the London agents we think exceedingly likely. We shall be sorry for this; but still, this is not *the profession*. It is for the honour and interest of that profession that all its members should be properly supported: if they are not so, irregularities occur which reflect discredit on the whole body. Now if this act distributes employment, it will prevent this, and thus do good. So far from injuring the profession, we conceive it is quite possible that the act will greatly benefit it; that it will call into action and employment hundreds, if not thousands, of competent persons. If rumour speaks correctly, the number of applications, both for judgeships and clerkships, has already far exceeded the number of places to be given away. A considerable proportion of the whole number of barristers eligible have, it is said, applied, and a proportionate number of attornies are also expectants. Does not this prove that we shall have no want of practitioners in these courts? It is very proper that some splendid incomes should be made in both departments of the

profession, and this will ever be the case: but we do not hold this to be essential to the respectability of the profession; and, low as the fees are, we believe that every one of these courts will be attended by a body of regular and constant practitioners of both branches, many of whom, it is true, may, for the first time, have the gratification of having clients, and may also turn out fully deserving of having them. Thus it may be, that by means of this act the profession may be REGENERATED.

We do not altogether participate in the gloomy views of a northern contemporary¹, who, alluding to the present state of the profession, considers that "the system is tottering to its fall; that powerful causes of dissolution, internal and external, are at work, and that it will require a decided and simultaneous effort on the part of its natural defenders, the Judges and the Bar, to postpone, much more arrest the catastrophe." Still we think the state of the profession, from the number of its unemployed members, is far from satisfactory.

But while we are desirous of supporting this measure, we must guard ourselves against misconstruction. It cannot be intended, by any clause of this act, to exclude qualified practitioners from these courts. We consider the advocate and the attorney to be an essential part of the court. It is reverting to a time of barbarism to throw all the duty and all the responsibility on the Judge. It may be necessary that the scale of fees should be regulated, and should be low, but both classes of practitioners should be invited to the court. Further, if it turns out that the fees mentioned in the act are not sufficiently remunerative, they must be increased. We believe that the fees paid in the superior courts are too high; still, if a proper fee is not secured for the services performed, it will be obtained indirectly if it is not given directly. Now, holding these opinions, we cannot look, without some doubt, upon the ninety-first section, given *antè*, p. 204.

The effect of this section appears to be, that a barrister or attorney has a right to appear, but that no other person has that right without leave of the Judge; and that not even a barrister or attorney can argue any question as counsel with-

¹ Edinburgh Review for October last.

out such leave. This section we conceive will not be easy to carry into execution. So far as excluding all persons not being barristers or attorneys, it is plain enough; but when after appearing, argument from the counsel begins and statement ends, it is difficult to say. We have heard it said of one eminent man that his statement was worth any other man's argument; and this is true in a smaller degree of many. Unless this power be given to a judge *in terrorem*, we know not what other use it can be of. Justice cannot, in our opinion, be effectively administered without the presence of professional assistance; yet we can conceive it possible that this power may be used oppressively, and we should certainly be glad to see it taken away or modified. But this is not the only difficulty in this clause.

"A question," says Mr. Udall, "arises as to what the fees mentioned in this section are to be a remuneration for:—Are they to be the remuneration for investigating whether a party has a cause of action, *as well as* the conducting the action in court, or are they the remuneration for doing the business in court only? The former construction would lead to considerable absurdity. Take, for instance, the case of replevin for a distress, *damage faisant*. The client consults his attorney. If the attorney advises that his client has a good case and goes on to trial, he cannot recover his fees for advising and investigating, although the party succeeds; but if he advises him *he has no case*, he can. Or supposing he advises him that he has a good cause of action, but declines to be the attorney in the new court, he could recover more if he declined to go on than if *he were successful in the action*." (p. 71.)

We are induced to agree with Mr. Udall that the only way of escaping from the absurdity is to construe the words "appearing or acting in court" in a strictly literal sense. The carrying out this clause into practice is no doubt one of the great difficulties of the act¹, and we trust that the construction given to it will be that most favourable to the profession, because justice and good sense both incline that way.

We have also to notice as a questionable point in the act that no *appeal* is allowed from these courts.

¹ See some sensible observations as to this in "The Jurist," vol. x. p. 341.]

Some impatience is being manifested by the public for bringing the act into immediate operation. It is to be observed, however, that before this can be done, two things are necessary. The districts of the courts must be ascertained, and the rules of procedure must be settled by the Judges of the superior Courts; neither of which operations can be instantly performed. We believe that no time was lost in endeavouring to ascertain the first point. Two gentlemen, peculiarly competent for the duty, were, immediately the act came into operation, intrusted with the details¹, and

¹ The following official communication was made by the Lord Chancellor, soon after the passing of the act:—

“Wimbledon, September 16. 1846.

SIR,—It is the intention of her Majesty's Government to proceed forthwith to put in execution the act recently passed for the recovery of small debts.

“The first thing to be done is the division of the country into convenient districts, which will be made by the authority of the Queen in Council; but it is advisable that the final consideration of the subject should be preceded by some local inquiry, in order that a consistent scheme may be brought under the notice of her Majesty's advisers.

“It is my wish that you should undertake to conduct these inquiries, for which you are well qualified, by your knowledge of the details of the Act, and of the several local Acts which it will supersede.

“I annex the particulars of a set of districts with which I have been furnished; from which, combined with the verbal instructions which you have received from me, you will perceive the principles on which I wish the division to be proposed.

“You will endeavour to ascertain from those persons who appear to you most likely to be able to furnish correct and disinterested information, how far these districts are likely to prove convenient, and what alterations may be deemed desirable. You will be careful to remind those whom you consult that this inquiry is merely preliminary, and that full opportunity will be given for the representations of all parties concerned, after the formal notice required by the Act shall have been given in the Gazette, of her Majesty's intention to take the matter into consideration.

“I have not thought it necessary that you should be furnished with more formal authority than this letter for instituting these inquiries, not doubting that you will meet with ready co-operation from all persons capable of assisting you, in obtaining for her Majesty's Government the means of perfecting this measure, the proper adjustment of which imports so highly to the common advantage.

“I am, &c..

“J. E. D. Bethune, Esq. &c. &c. &c.”

(Signed) “COTTENHAM.

Mr. Bethune associated with him Captain Dawson, R. E., the assistant Tithe Commissioner, and proceeded to address the following letter to various local authorities:—

we understand that they are very nearly completed. It is highly to the honour of these gentlemen that they have performed this important service *gratuitously*. When the districts are completely mapped out and finally approved of, it will then be necessary that notice should be inserted in the Gazette of the intention to make the district according to s. 8., *antè*, p. 197.; but as the local authorities will have been previously consulted, it is probable that the districts will be conformable to the necessities of the case. Population, and not area of space has, we understand, been the basis of the arrangements, and fewer districts than were at first calculated have been found to be sufficient. The registration districts have been made the basis of the districts of the new courts, and we understand that it is the intention that no one should have to travel more than ten miles from the court to which he has occasion to resort.

That these districts should be rightly settled is extremely important; the Act of the previous session, 8 & 9 Vict. c. 95, having entirely miscarried from its being defective in this point. When this is done, but not till then, as we apprehend, the Lord Chancellor will make the appointments of the Judges. He may bring the Act into operation all over the country at once, or he may do this gradually and from time to time. Of course we have no means of knowing his Lordship's intentions as to this; but if the Act is brought at once into operation, there is, perhaps, a better chance of

"Gwydir House, Whitehall, 22d September, 1846.

"SIR,—The annexed letter will inform you that I have been requested by the Lord Chancellor to collect such information as may enable him to lay before the Queen in Council a scheme for the division of England into districts under the Small Debts Act. I shall be much obliged to you if you will send me a list of the towns in which petty sessions are usually held in your county, and of the name and address of the clerk to each bench of magistrates.

"I should also be glad to receive copies of the notices relative to the revision of the voters' lists which have just been circulated by the revising barristers.

"These documents will assist me in preparing a statement, which I hope to be able to send down to you, accompanied by a map, in time for the meeting of the magistrates at their ensuing Michaelmas sessions.

"I have the honour to be, Sir,

"To the Clerk of the Peace
for the County of ."

"your obedient Servant,

"J. E. D. BETHUNE.

establishing a uniform practice, which is highly important. So far as to the districts.

As to the rules : these, we apprehend, have not been so easy a matter to forward. The Act passed when most of the Judges were on circuit, and were looking forward to their long vacation. To sit down and prepare a Code of Practice for Small Debt Courts, judging by our own feelings, would have been about the most detestable relaxation that could be conceived. With minds jaded and overworked, with bodies, every inch of which outside and inside required a respite from work, and change of place, it was a little too much to suppose that this could be possible ; but now the judicial mind and body, refreshed by the sight of the snows of Switzerland, the waters of the Rhine, the air of Italy, the pleasures of France, the sweetness of our own lakes, the varieties of our watering-places, revived, in fact, by all the joys of the long vacation, invigorated by exercise, stimulated by innumerable victories over partridge and pheasant, redolent peradventure of grouse pie, — we say that, perhaps, in the latter end of the month of October some way may have been made with the new Rules and Orders. Still, we doubt whether the Act will be brought into operation before Christmas. But we hope that, with the new year, the new courts may come into existence.

We now bring this Article to a close with one other observation. The institution of these local courts, we think, will render another change necessary : this is the compilation of a complete Digest of the Common Law. This should be undertaken by the Government, for without it we can have no settled or uniform law in this country.

CORRESPONDENCE.

[In conducting this Journal we shall be willing under this head to insert any letters in opposition to the views maintained in our pages. But of course we expect that any such letters shall be in temperate language; and we may also hint that they must not be too long, as the space to be devoted to them is very limited.]

MR. STEWART'S LETTER TO OWNERS OF LAND.

*A few Words to the Members of Agricultural Societies and others interested in Land.*¹

GENTLEMEN,—The Act which allows a free trade in corn has passed. It may be regarded by you with different feelings — by many as the harbinger of ruin, by some as the commencement of a sounder state of things; but it is now the law of the land, and it cannot be supposed that a measure sanctioned by the leaders of the two great parties in the state will be repealed without a trial, even if temporary circumstances did not greatly favour this view.

But there is a point to which you can immediately direct your efforts, and which, I think, I shall be able to show you, you may reasonably hope to carry. We are to have free trade in the produce of the land,—let us also have free trade in the land itself. You all know that the buying and selling of land is at present any thing but free; you all know the expense and delay which now embarrass all dealings in land. Is it not worth your while to consider whether these must be submitted to as inevitable evils; or whether, by taking the proper pains, you cannot materially lessen them? I need hardly say that if this can be done, you, as the owners of land, will be benefitted, and that every thing that gives greater facility to the transfer of land will enhance its value.

¹ This address appeared, for the first time, in the *Times* of the 22d of October last. As it has attracted considerable attention, we think it may be useful to reprint it here, as a more permanent record. We agree with every word it contains, and so will the great body of the profession. We will only address to Mr. Stewart one word, "PERSEVERE." It is an important element of success, that the great organ of public opinion which first gave it circulation has promised assistance, and that the press of all shades of party appear willing to co-operate.

If you can buy land more easily, or sell land more easily, or borrow money more easily on your land, this is a direct benefit to you, for persons interested in land usually wish to buy it, or to sell it, or to enjoy it, and to render it available for their necessities.

What, then, is the state of the law as to land? Is it clear, and simple, and easily understood, or is it difficult to comprehend? You know, if you are wise men, that you know nothing about it; that the law relating to it, so far from being simple or easily comprehended, is the most difficult branch of our jurisprudence; that many lawyers profess not to be well acquainted with it, and that this responsibility is thrown on a comparatively small number even of the learned profession. Now, I think you will agree with me that this is not as it should be; the laws relating to property should be few and simple. Intricate and difficult questions will no doubt arise in civilised states; but the familiar transactions, the sale and the mortgage, should be easily understood and easily performed. We know they are so in personalty, in produce, in stock in the funds. Is it absolutely necessary that the purchase and mortgage of land should be so difficult and so expensive as they now are? The law as to suits and actions may be hard and vexatious; but then few people after all go to law, but almost all are, more or less, interested in land.

What spell then binds the land of this country? We cross over to Belgium, to Prussia, to France, and we find that the transfer of land in those countries is nearly as easy and simple as that of stock in the funds. The Government of those countries demands a larger sum in the shape of stamp than in England, and this may or may not be a proper mode of raising revenue; but, so far as relates to the acts of the parties, the expense and delay are very inconsiderable. This has been brought out in a striking way in making purchases of land for railways, of which the same persons are directors in England and in France or Belgium. Now, what is the result of this increased facility of transfer? We find that land is more valuable in France, in Belgium, and in Prussia than in England; it fetches more in the market, and money can be borrowed on land at a much easier rate there than here; and it is not unreasonable to attribute this, at all-events, in part to the difference in the law. If, then, land is susceptible in one country of a ready transfer, and not in another, there is something wrong in the law of the country in which it is impeded, and I hope to show you what it is in our law which occasions this loss and inconvenience to the holders of land.

The primary rules of our law relating to real property in this country are all founded *on the feudal system*. The policy of that system was to restrict alienation, and in some cases actually to prohibit it. It looked upon the transfer of land with disfavour, and it was only by slow degrees that land was emancipated from its most rigorous rules. Many of them have been evaded after a clumsy fashion, and indeed the history of the law down to the present time, is a series of struggles to evade them; but to this day, on every alienation of freeholds, the rules established by the feudal system *must be borne in mind*, and in the alienation of copyholds these are in full force. The spectre of feudality still haunts the land, clanking its chains, and rising at the most unforeseen moment to scare the lawful owner from doing what he will with his own.

Let it be remembered that down to the end of the reign of Henry VIII. no one could will his freehold lands, and that down to the 55th of George III. no one could will his copyhold lands without a previous surrender; and down to the first year of the Queen no one could will his customary lands without a previous surrender; that so late as the reign of King William IV. an entail could not be barred except by a fictitious suit called a fine or a recovery; that down to the fourth year of the reign of Her Majesty *two* deeds were usually employed instead of one in the most simple dealing with land; that down to the commencement of this year those useless phantoms termed "outstanding terms for years," were in full activity; and that now, according to the established practice, before an acre of land can be sold, its history for the last sixty years, at least, must be told.

But I am sure I need not say any more as to this. You all know, by woeful experience, the present state of the law as to real property, and it is sufficient to say, that if its present rules are strictly carried out, they render many small interests in land absolutely unsaleable. The only way of dealing with these is to dispense with ceremonies considered necessary in larger sales, and to take them *on trust*, without any inquiry as to title at all. How then can this state of things be remedied?

I conceive we should all endeavour to obtain —

1. Simplicity and uniformity of tenure.
2. Easy, cheap, and expeditious modes of transfer.
3. Shorter, and more simple deeds.
4. A greater certainty as to time in completing the sale and mortgage of land.
5. Some mode of shortening inquiry as to title.

In order to gain these desirable objects, let me direct your attention to one or two points which will help us in obtaining them: —

1. A general map of the country should be made. This exists in every civilised land, and greatly facilitates and simplifies all dealings with land. Several recent investigations, as the Tithe Commutation, the Enclosure of Commons, and, in Ireland, the Ordnance Survey, will be found serviceable as to this. A state-map would assist other changes; but it would be exceedingly useful as a measure by itself.

2. A general registry of titles should be established. This will, when once it comes into effectual operation, shorten both deeds and title. This also exists in every other civilised country, and even, in an imperfect form, in Scotland and Ireland.

3. Proper consideration should be given to the whole subject by competent and unprejudiced persons employed by government.

You will see that the times favour the chance of obtaining your reasonable demands in this matter. In Scotland there is a strong desire to get rid of entails; for here the feudal law presses on the land even more severely than with us. In Ireland the whole law of tenure is in a confused and unsatisfactory state, and enlightened persons are demanding laws which will facilitate the transfer of land, as a panacea for many of her present heavy troubles. In England, a committee of the House of Lords unanimously reported last session in favour of "a thorough revision of the present system of conveyancing." A little exertion, then, is alone wanting. For who is to oppose you?

The landed interest will not oppose any measure for the benefit of the land. The mercantile body have always been fond of investing their savings in the purchase, and of lending their monies on the security of land. Even the lawyers are beginning to find out it is not their interest to thwart measures which will multiply all dealings in land tenfold. The present ministry will not withstand a strong and earnest appeal to them. All, then, that is wanted in this juncture is, that the appeal should be made. All that is wanted is a little exertion. Let us, at all events, insist that these matters should be fully inquired into; and if this inquiry results in raising the value of your land to the price that it fetches on the Continent, you will perhaps have the less reason to regret the present crisis, which will have enabled you to carry the measures to which I have referred.

I am, Gentlemen, your most obedient Servant,

JAMES STEWART.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST AUGUST, 1846.

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I. POINTS IN COMMON LAW.

1. Copyright. Fraudulent Description. 2. Joint Stock Company. Authority.
3. Nuisance. Encroachment by projecting Building. 4. Horse-racing.
- Lottery. 5, 6. Arbitration. Judicial Conduct. Magistrates. Arbitrator.
7. Attorney. Costs. Guarantee. 8. Interpleader. Practice.

1. WRIGHT *v.* TALLIS. 1 Common Bench Rep. 893.

Copyright — Fraudulent Description.

THIS is a case of considerable novelty in a court of law, and the principle established by it is of great value to the public. Quackery and false representations in matters of mere commerce have already received effectual discouragement in Courts of Equity; and

the case before us shows that Courts of Law are equally ready to deny their support to rights or claims based in fraud and falsehood. The principle was exemplified in *Pidding v. How*¹, where the plaintiff made a species of mixed tea, and vended it with great success, under the title of *Howqua's Mixture*. Had he stopped there, he would have at least been safe: but he proceeded to issue labels and advertisements containing false statements respecting the composition of the mixture and the mode of procuring the ingredients. Afterwards on *How & Co.* selling teas under the same name of *Howqua's Mixture*, *Pidding* applied to the Court of Chancery for an injunction to restrain the sale. But the Vice Chancellor of England (Sir L. Shadwell) refused the relief. "There has been," said His Honour, "such a degree of representation, which I take to be false, held out to the public about the mode of procuring and making up the plaintiff's mixture, that, in my opinion, a Court of Equity ought not to interfere to protect the plaintiff until he has established his title at law as between the plaintiff and defendant: the course pursued by the defendant has not been a proper one: but it is a clear rule laid down by Courts of Equity not to extend their protection to persons whose case is not founded in truth. And, as the plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that unless he establish his title at law, this court cannot interfere on his behalf." A similar decision was subsequently pronounced by Lord Langdale, M. R., in *Perry v. Truefitt*², where the plaintiff, as the proprietor of a composition, called *Mexican Balm*, for the improvement of the growth of human hair, published advertisements on the wrappers of the bottles, alleging that the article was made from foreign and rare herbs, according to the receipt of the eminent German physician, Von Blumenbach, and that a near relation of that person had communicated it to the plaintiff. In that case, and notwithstanding the impropriety of the defendant's conduct in selling the article without the plaintiff's permission, the Court refused to give any assistance to the plaintiff, and left him to such remedy as he could obtain from a Court of Law. The case of *Wright v. Tallis*, now under consideration, goes far to show that the plaintiffs in *Pidding v. How*, and *Perry v. Truefitt*, would have been equally remediless at law. *Wright* and *Tallis* were both of them booksellers and publishers; and *Wright* claimed the

¹ 8 Sim. 477.² 6 Beav. 66.

copyright of a book, called "Evening Devotions," purporting in the title-page to be from the German of Sturm; author of the Morning Devotions, and to be translated by R. H., Esquire. To this book there was a preface eulogising at great length the compositions of Sturm, and announcing the Evening Devotions as the work of the same "inspired writer." The defendant pirated this publication; and on an action for the infringement of the copyright, the defendant pleaded that the work was not a translation by R. H. of any original work of Sturm, but was wholly composed by R. H. in the English language, and that there never was any work of Sturm, or of any foreign author of which the book in question was or could be a translation. To this plea the plaintiff demurred, and in the course of the argument, the above-cited cases were quoted, with many others relating to blasphemous or obscene publications. Reference was also made to Walpole's Castle of Otranto, and De Foe's Robinson Crusoe, the former of which purported to be a translation from the Italian, and the latter was expressed to be composed by the adventurer himself. Tindal, C. J., mentioned also that Buller's Nisi Prius was considered to be the work of Mr. Justice Bathurst; and he enquired if it could therefore be said that there was no copyright in it.

His Lordship afterwards gave judgment in the following terms: "The question raised upon this record is, whether the plaintiff can have a right of action against the defendant for pirating this work; or, in other words, whether the plaintiff has a valid and subsisting copyright in this work. The question is one of the first impression, and cannot be said to be free from considerable difficulty. But, upon the best consideration that we can give it, and reasoning from principles which appear to have an analogy with the present subject matter of inquiry, we think that the plaintiff has no ground of action. The plea alleges that the plaintiff made false representations to the public with respect to the work, for the object and purpose of imposing on the public, and of inducing them to give large prices for the copies which they purchased. And it further alleges that the plaintiff at the time (as it is obvious, from the facts stated, he must have done) knew such his representations to be false. All these allegations are admitted by the demurrer to be true, — the false assertion and representation on the plaintiff's part — his knowledge that such assertion and representation were false — and that the act was done from a base and unworthy motive, namely, that of obtaining money from the public by this false pretence. The first observation, therefore, that arises is, that the present case is perfectly distinguishable

from those which have been referred to at the bar of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed instead of a true name. Such was the instance given of the *Castle of Otranto*, professing to be translated from the Italian; and such is the case of innumerable works published under assumed names — voyages, travels, biography, works of fiction or romance, and even works of science or instruction; for in all these instances the misrepresentation is innocent and harmless. There is not found in any one of these cases any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation: the purchaser, for any thing that appears to the contrary, would have purchased at the same price if he had known that the name of the author was an assumed and not a genuine name, or had known that the work was original and not translated. And, indeed, in most of the cases that can be put, the statement is not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases, therefore, it was perfectly indifferent to the public whether the representation was true or not; and, in all probability, the book would have obtained an equal sale whether it was a translation or an original, whether the name of the author was assumed or genuine. But in the case before us, no one of these observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who (once) had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but to deceive the public, by inducing them to believe that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under false pretences; and as not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement. . . . We think the best pro-

tection that the law can afford to the public against such a fraud as that laid open by this plea, is to make the practice of it unprofitable to its author."—Judgment for the defendant.

2. STEELE v. HAMER. 14 Mees. & W. 831.

Joint Stock Company — Authority.

The directors of a cemetery company were by the 46th section of the Act of Incorporation empowered "to make contracts and bargains touching the undertaking and to do and transact all other matters and things which shall be requisite to be done and transacted for the direction and management of the affairs of the said company and of said directors." They were also especially empowered to raise money on the credit of the undertaking by *mortgage*. The Court of Exchequer held that the 46th section gave no authority to the directors to raise money for the purposes of the undertaking, by accepting or indorsing bills of exchange.

3. FAY v. PRENTICE. 1 Common Bench Rep. 828.

Nuisance — Encroachment by overhanging Building.

The law infers damage whenever a man's rights are obstructed or encroached upon, and therefore in an action on the case for any such obstruction or encroachment, it is not necessary to prove special damage or actual injury; and where special damage is alleged, but there is a failure in the proof, the presumption of law will supply the defect in the evidence. Were it otherwise, the party whose rights are prejudicially affected or invaded might be precluded from his remedy by the casual non-user of them for a given time. This doctrine is very clearly illustrated by the case before us. In May, 1844, the defendant being possessed of a messuage built up to the extreme boundary of his own land, erected an ornamental cornice upon the messuage in such a form as to jut or project about 14 inches over the plaintiff's garden immediately adjoining. The declaration alleged that by reason of this cornice rain water flowed thence into the garden, and so incommoded the plaintiff in the enjoyment thereof. At the trial the plaintiff attempted to prove that the plants and gravel-walks in his garden were injured by the dripping of rain from the cornice; but, on cross examination, none of the witnesses would

swear that any rain had fallen on the plaintiff's garden from the time of the erection of the cornice down to the commencement of the action on the 2d of July, 1844. It was therefore contended that the plaintiff ought to be nonsuited, the injury complained of in the declaration not having been sustained by the evidence. Tindal, C. J., however, refused to nonsuit the plaintiff, but reserved the point, and left it to the jury to say whether or not the plaintiff had been injured by the dripping of rain from the cornice, or by reason of the projection itself, which latter, he intimated to be a sufficient cause of action, as the plaintiff was thereby prevented from building to the extremity of his own land. The jury gave a verdict for the plaintiff with 40*s.* damages. A rule nisi for a nonsuit, on the ground suggested at the trial, was afterwards granted by the Court of Common Pleas, but, on cause being shown, the rule was, after full argument, discharged. Cresswell, J. "The declaration in this case discloses that which is the subject-matter of an action upon the case, both as respects the falling of rain upon the plaintiff's garden and the overhanging of the cornice. The introduction of the particular allegation of damage from the dripping of rain, does not exclude evidence of general damage resulting from the erection of the nuisance. In *Bateman's case*¹, the Court say that damage was necessarily to be presumed from the overhanging of the defendant's house over the house of the plaintiff's. So here, in the absence of evidence to the contrary, it must be presumed that the projecting of this cornice over the plaintiff's garden is a nuisance and injury to him." Rule discharged.

4. *ALLPORT v. NUTT.* 1 Common Bench Rep. 975.

Horse-racing — Lottery.

In this case a direct decision has been pronounced upon the illegality of the sweepstakes or little-go lotteries, which are established at so many public-houses in London and elsewhere, with reference to the races at Epsom, Doncaster, and elsewhere. The scheme as stated in the plea to an action by the plaintiff against the treasurer or stakeholder for 100*l.* as money had and received to the plaintiff's use, was described in the following terms. The adventurers or subscribers were 155 in number. Each subscriber contributed 1*l.* and paid his money to the defendant as treasurer. Before the race the name of each horse entered was put on a

¹ 9 Co. Rep. 536.

separate card, making together 155 cards, which were placed in a box and mixed up in one general mass. In like manner the names of the subscribers were written on separate cards, making together 155 cards, which were also mixed up and placed in a box in one mass. After this process, two disinterested persons drew out the cards as chance directed, first drawing out a horse-card, and then a subscriber's card until all the cards should be drawn, and eventually the subscriber, whose name was drawn out next after the drawing of the card containing the winning horse's name, became entitled to receive a prize of 100*l.* out of the money paid to the treasurer. The plaintiff averred that on the 15th of May, 1844, the race in question (the Derby) was run at Epsom and won by Running Rein, whose name was on the horse-card drawn out next immediately before the plaintiff's name was drawn. Under these circumstances he sued the treasurer for the 100*l.* prize. The defendant, however, pleaded the illegality of the transaction within the various statutes against lotteries. To this plea the plaintiff demurred; but judgment was given for the defendant. The Court decided that the adventure was a lottery and in express contravention of the statutes 10 and 11 W. 3. c. 17., and 42 Geo. 3. c. 119.; and also, that the plaintiff could not by law recover the money as a legal bet upon the winning horse, it being, if a bet, a bet by which he would recover 100*l.*, and so being in violation of the statute 9 Anne, c. 14.

5. DOBSON *v.* GROVES, AND THE QUEEN *v.* DOBSON. 6 Q.B. 637.

Arbitration — Judicial Conduct.

At one of the meetings on the reference to arbitration in this case, which related to the construction of a floating-pier at Greenwich, both parties declined to call the under water-bailiff of the City of London as a witness; whereupon the arbitrator stated that he should himself examine him, and appointed a meeting for that purpose. At that meeting the arbitrator examined the under water-bailiff, but refused to allow the defendant's attorney to cross-examine. A few days after, and before the awards were made, the arbitrator had another meeting with the under water-bailiff, but not in the presence of the parties, except a special pleader who had before appeared for one of the parties, but did not on the present occasion attend professionally. Rules were obtained to shew cause why the awards should not be set aside, on the ground

of irregularity on the part of the arbitrator in holding these meetings in the absence of the parties or their attorneys ; and on cause being shewn the awards were set aside. Lord Denman, C. J. "An important principle is involved in this application. When the rule was moved for, no imputation was cast upon the motives of the arbitrator ; but the facts stated threw great doubt on the validity of the award. It has been ingeniously argued that we may get rid of the difficulty by limiting the effect of the objection to certain points only ; but I think that cannot be done in the present case. It is clear that the arbitrator held a meeting on the 3d of October, for the purpose of making up his mind on one of the subjects referred ; a gentleman was present who had acted as advocate in a former stage of the reference. The arbitrator said that nothing which passed on that meeting would influence his decision : but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it. The proceeding is quite different from that of consulting a legal friend on the framing of the award ; that is legitimate : but here the conference is on something to be done by the consulting party, as arbitrator, on the matters referred : it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed. * * *

I think that on this subject we can draw no line, but must abide by the general principle, and oppose all attempts to explain, by the bearing of particular parcels of evidence, whether the inquiry had, or by any probability might have had, an effect upon the arbitrator's decision. When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection. It is suggested that the complaining parties waived their right to object by not protesting before the award was made. Where an irregularity takes place at a meeting of all the parties, and is passed over, that observation may apply. But where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was irregular is past. The mischief was done at the time, and cannot be removed." Rule absolute.

6. THE QUEEN v. THE JUSTICES OF HERTFORDSHIRE. 6 Q. B. 753.

Judicial Conduct — Hearing by Magistrates having an Interest.

At the Quarter Sessions for the county of Hertford, an appeal was heard against an order of two of the justices, directing that

part of a rate should be paid by the surveyor of the highways of *Bygrave*, to the commissioners of the *Baldock* and *Bournbridge* turnpike trust, for the repair of such part of the turnpike road as lies within that parish. One of the magistrates before whom the appeal was heard, had joined in making the order, and was a respondent in the appeal. He was, during part of the hearing, in conversation with the magistrates on the bench, and appeared to take a part in the discussion as to the appeal; [but he left the Bench before the hearing was concluded, and took no part in the determination. Another of the magistrates before whom the appeal was heard, was a creditor of the B. and B. turnpike trust, and his sole security consisted of the tolls. He sat on the bench during the hearing of the appeal, and retired with the other magistrates after the hearing, and voted in favour of confirming the order, but did not take any active part in the discussion, or in promoting the determination. It appeared that ten magistrates retired into the room, and that all but two voted for the confirmation of the order, and it was contended in support of the order that, there being, without the vote of the creditor magistrate, a majority for confirming the order, the order was not vitiated. But the Court of Queen's Bench ordered a *certiorari* to issue. Lord Denman, C. J. — "I am clearly of opinion that this order of the Quarter Sessions must be brought up to be quashed. Both these gentlemen had a disqualifying interest. Mr. ———, as a creditor, had an interest in the funds of the trust to which the money was to be paid. It is contended that, as the majority, without reckoning his vote, was in favour of the confirmation, the order is not vitiated. But, in my judgment, a decision is vitiated by any one interested taking a part in it. We cannot enter into an analysis of the different motives which may have produced the decision; it is enough to say that a single interested person has formed part of the Court. Then, next, Mr. ———, as respondent, might be liable to costs. I think the circumstances here deposed to are sufficiently strong to call upon him to show that he took no part in influencing the decision, and, even then, one would be sorry to see that a magistrate who was interested, joined in the discussion at all. It probably never occurred to him that he was interested and disqualified. Still we must take care that interested parties do not join in deciding cases. I think that the *primâ facie* case is not answered by the fact that he left the bench before the actual decision took place, for it is quite consistent with this that he may have joined in the discussion so far as to affect the result." Patteson J. "I think that it is very

dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves, and it is impossible to say what effect that discussion may have on the decision. The real question is, has an interested person taken any part at all?"

7. *In re STRETTON.* 14 Mees. & W. 806.

Attorney — Guarantee against Costs.

In this case the attorney employed to conduct an action of *Chester v. Chapman*, had given the plaintiff an undertaking in the following terms:— "Yourself v. Chapman. Sir, should the damages or costs not be recoverable in this action, under the circumstances I shall charge you costs out of purse only." The plaintiff obtained a verdict, and judgment was entered up: but the defendant took the benefit of the Insolvent Debtors Act, and a dividend only was payable out of his estate in respect of the judgment. The question was, whether under these circumstances the attorney was bound to charge only costs out of pocket, and the Court of Exchequer held that he was not so bound. Pollock, C. B. "The attorney did not mean to guarantee the solvency of the defendant, but merely that of the suit."

8. *SLANEY v. SIDNEY.* 14 Mees. & W. 800.

Interpleader — Assumpsit — Trover.

The defendants had agreed to purchase several chests of tea, the warrants for which were made out in the plaintiff's name. Before the time for payment arrived they were served with a notice from third parties, that the tea warrants belonged to and had been improperly obtained from them, and requiring the defendants not to pay the price to the plaintiff. An action of trover having been brought by the claimants of the warrants, and the plaintiff having brought his action for the price of the teas, the defendant moved for an interpleader rule under the act 1 & 2 W. 4. c. 58. s. 1. Parke B. "The parties cannot interplead here, for they do not claim the same thing; the one seeks to have the benefit of a contract, the other claims the value of a chattel which is the subject-matter of it. The plaintiff in this action claims the price agreed to be paid for the tea, which may be ten times its real value: while the plaintiffs in the other action only claim its real value in the shape of damages for its conversion."

II. POINTS IN EQUITY.

1. Principal and Surety. 2. Breach of Trust. Interest. 3. Solicitor. Costs. Principles of Remuneration. 4. Evidence. Presumption of Death. 5, 6. Practice.

1. CAULFIELD *v.* MAGUIRE. 2 Jones & Latouche, 141. 164.

Principal and Surety — Interest.

It will be recollected, that *Copis v. Middleton*¹ is a leading case in the learning upon the relation of principal and surety; it having been there decided, that a surety in a bond, paying off the bond debt, becomes not a specialty creditor, but merely a simple contract creditor of his principal. In the administration of the assets of the deceased principal, the consequences of such a decision are very obvious; and where the principal happens to die deeply indebted by specialty, the result may deprive the surety of all chance of reimbursement as a simple contract creditor. The case now before us, appears to be a corollary to *Copis v. Middleton*, and raises the question whether or not a surety, who, by payment of the joint debt of himself and his principal, is become a simple contract creditor of the latter, is entitled to claim interest on his demand. Richard Earl Annesley, being tenant for life of certain settled estates in Ireland, with remainder to his first and other sons in tail, the Earl and his eldest son, Viscount Glerawley, joined in charging the estates with the payment of an annuity of 455*l.* The son was a mere surety in the transaction, and received no consideration for his concurrence. The Earl also assigned to the trustees of the annuity a policy of insurance on his own life for 5000*l.*, and the trustees were directed out of the charge on the estates, and the insured sum of 5000*l.*, or the interest or proceeds thereof, to raise and pay the annuity. The Earl, and the Viscount also, as his surety, joined in a bond to trustees for 3000*l.* for better securing the payment of the annuity. Lord Glerawley survived the Earl, and died in 1838, and the executor of Lord G. was compelled by the annuitant to pay very large arrears of the annuity which had accrued since Lord Glerawley's decease. Under these circumstances, Lord Glerawley's executor claimed to stand as an annuity creditor of the Earl's estate; and insisted, not only upon reimbursement to Lord Glerawley's estate of the amount of

¹ 1 Turn. & Russ, 224.

the arrears so discharged thereout, but demanded payment of interest upon the amount as against the estate of the Earl, who was the principal debtor. It is well established, that simple contract debts do not carry interest, unless by special custom, or the course of dealing between the debtor and the creditor. It has also been very clearly decided, that interest is not recoverable upon the arrears of an annuity.¹ And the Court accordingly disallowed the abstract claim for interest as against the Earl's estate, and upon a mere simple contract debt. But inasmuch as the 5000*l.* received upon the policy at the Earl's death had not been applied towards satisfaction of the annuity, Lord Glerawley's executor was allowed to resort to that fund for satisfaction of his demand.

Lord Chancellor Sugden. "This appears to be an attempt to get rid of *Copis v. Middleton*. That case established that a surety in a bond paying off the demand, does not become a specialty creditor of the principal, but only a creditor by simple contract. But it was said that that simple contract debt carried interest. I know of no authority for that. In an action for money paid interest cannot be recovered, unless there be some dealing between the parties to warrant it; — something to show that it was part of the contract. This is a mere simple contract demand, not carrying interest; and upon this point there can be no doubt. . . . The other point is of a different nature. . . The persons [the Earl's executors] who now resist the demand of the surety, have received, as part of their testator's residuary estate, that very sum of 5000*l.* which was pledged for the payment of the annuity, and also the interest, which has accrued due on it since it was received by the executors. . . In this court you cannot go against the surety whilst the fund primarily applicable remains; for he has a right to have that fund applied for his benefit. There is no doubt, therefore, that the surety would have a right to go against those parties for the whole amount of the 5000*l.*, and the interest on it, to be repaid thereout, which he has lost. If that sum had been properly applied, he would not have lost any thing; he never would have been called upon to pay. Now that 5000*l.* has produced interest; and I have no doubt that the surety is entitled to the benefit of that which it has produced. He is entitled to go against the interest, as far as it extends, to pay him what he has lost, and to go against the corpus of the fund for payment of the principal money."

¹ *Martin v. Blake*, 3 Drury & Warren, 125.; *Booth v. Leycester*, 1 Keen, 247.

2. MELLAND v. GRAY. 2 Coll. 295.

Breach of Trust—Interest.

A trustee is never allowed to make advantage to himself, either of his situation, or of the property committed to his charge. It is, therefore, his duty to avoid mixing trust-monies with his own, and thus obtaining a fictitious credit, by means of which his own situation or circumstances in life may be incorrectly represented. In the present case an executor (Mr. Gray) retained a sum out of the residue of his testator's estate to answer certain claims, as to which a difficulty existed, and he placed this sum to his own private account at his bankers'. The court held that he was chargeable with interest for the amount. Vice-Chancellor Knight Bruce: "In this case I assume in Mr. Gray's favour, that he had reasonable ground for retaining the money, which he did retain, and not paying it to the claimant. I assume that he gave early and sufficient notice of the difficulty to the claimant, and that the claimant did not direct or ask Mr. Gray to invest or appropriate the money in any manner; and that the claimant might have proceeded, so far as his own interests were concerned, much more speedily than he did. Assuming these facts, it is very possible that had Mr. Gray taken upon himself to invest this money, or set it apart to a separate account with his bankers, so as to have had no direct use of it, — though, perhaps, he might with regard to other accounts, have had an indirect benefit from the balance being with his bankers; — it is possible, in either of these cases, that Mr. Gray might have been held justified in so investing the money, or not charged with interest upon it. . . . Mr. Gray was a man in business; it may not be correct to call him a trader. . . . I cannot, therefore, consider this gentleman as one to whom it was not beneficial and useful at least to have a balance of cash at his command. It is established that if a man *in trade* has money at his bankers' standing to his general account, mixed and blended with his own money, he is to be considered as having made a beneficial use of it. For the present purpose I am unable to distinguish a gentleman in Mr. Gray's situation from a person in trade, and I think it perfectly consistent with all the assumptions which I have made in Mr. Gray's favour, to say that he used this money for his own purposes, — an observation entirely consistent with respect for Mr. Gray and his motives. If that is the right view of the case, how can I hear it suggested that he, however justified in retaining the money, is justified in retaining the profit made with the money for his own benefit? Though I do not

believe that he was actuated by any improper motives in retaining the money, I consider it right to charge him with interest upon it; but, under the circumstances, not with compound interest."

3. *LUCAS v. PEACOCK.* 8 Beav. 1.

Solicitor — Costs — Remuneration.

The just and governing principle by which the remuneration of solicitors for their professional services ought to be regulated, has not yet been struck out by any of the acute minds which have heretofore bestowed attention upon the practical administration of justice; and we notice the present case merely for the sake of the observations which it called forth from the Master of the Rolls with reference to the foregoing subject. Certain items, extending over nineteen brief sheets, had been disallowed by the Taxing Master in the bill of costs of the solicitor of the defendants, Christopher and Harry Lucas, on the ground that the same solicitor had also been solicitor of the plaintiffs, and that it was a useless expense for a solicitor acting on behalf of defendants to take copies of documents which he possessed as solicitor for the plaintiffs, whose interests were the same as those of the defendants, and that it was also improper for him to serve himself as solicitor for the defendants, with warrants taken out by himself as solicitor for the plaintiffs. On a petition by the solicitor for a review of the taxation, and a like petition by the plaintiffs, the foregoing points were urged against the applications. Lord Langdale, M. R. : "These petitions seem to involve one important point. If solicitors were always justly paid according to the real value of their services, it would be right to say that they should be entitled to payment only for that which has been of real service to their clients; but we all know that in practice, and according to old established rules of taxation, solicitors are sometimes very ill paid, and, in some cases, are not at all paid for very important services rendered by them to their clients. If they are not allowed, those fees which the practice sanctions, they would not be adequately remunerated. I should be glad to see such rules of practice established as would secure to them a sufficient remuneration for all real services, and exclude them from all payment for services pretended, or merely nominal, and not real. The discovery and establishment of such rules would be of great importance to both solicitors and clients, whose real interests are the same; but in the mean time, and while a solicitor is not entitled to any remuneration, or is allowed a very inadequate remuneration for real

services, I shall be slow to admit that he is to be deprived of any legal fees which the established practice of the court warrants, on the notion that the business charged for might have been of no practical benefit. The nearer we approach to a due and certain remuneration for real services, the nearer we get to the abolition of fees for services, which practically may have been of little or no advantage." . . . "In the Master's Office, the same solicitor appeared for the plaintiffs and for two defendants, having interests identical with the plaintiffs, and the Taxing Master was of opinion that there ought not to have been separate attendances for those defendants: that is, that the Master in Ordinary ought to have ordered that those defendants should not be separately represented before him. Upon the consideration of the mode in which the decree was to be carried into effect, I presume the Master would, if proper, have done this; but not without a suggestion from somebody; and the fault found by the Taxing Master with the solicitor is, that he did not inform the Master in Ordinary that his clients, the defendants, had interests identical with his clients, the plaintiffs, and did not obtain from the Master in Ordinary that order which, it is said, would have been made of course, if it had been so suggested. Now, I own, I cannot assume that. It appears that the situation of these particular defendants was such, that at the commencement of the suit, whatever became of it afterwards, it was the opinion of the counsel that it would not be proper or fit to make them co-plaintiffs. The record having been framed upon the most careful consideration of counsel, I think that when costs are to be taxed as between solicitor and client [as in this case], very great regard must be had to that circumstance. Otherwise, how can the solicitor be safe in any course of conduct he may pursue? It is said that though their interests might not have been originally the same, yet they subsequently became identical with those of the plaintiffs. It may have been so: but it does not appear that they did become precisely and identically the same on all occasions upon all questions which arose. They might have, and it seems they had, an identical interest upon one occasion: for they joined together in a certain proceeding before the Master, for the purpose of obtaining a separate report; but during this period the solicitor, though acting for the plaintiffs, was responsible to the defendants, and he was under the necessity, upon every occasion, of protecting their interests. How was he to be remunerated for that? I know not how that attention is to be remunerated except by the allowance of these charges, inasmuch as rules of taxation in this court have

not yet been found, which adapt the remuneration to the value of the services rendered. Services of very great value are rendered, for which no direct remuneration at all is given by the ordinary rules of taxation, but for which compensation is made in a manner which I can never speak of with satisfaction, but always with very great regret. It is notorious that in numerous instances compensation for real services *bonâ fide* rendered, is not given by paying for that real and *bonâ fide* service, but is alone obtained through payments, to a considerable amount, for services which are really of little or no value to the client. I regret this state of the practice, and sincerely wish it could be amended. Many attempts have been made to find out a more satisfactory mode of remunerating solicitors, but none has yet been suggested. However, is this solicitor who has rendered these services to the defendants, and watched over their interests, to be deprived of the only remuneration which the course of taxation affords him? I own, I cannot see a sufficient reason for it."

4. WATSON v. ENGLAND. 14 Sim. 28.

Seven Years' Absence — Death — Presumption.

This case deserves notice on account of its tendency to overthrow the long-prevailing legal presumption that a person who has gone abroad, and has not been heard of for seven years, is dead. By the decree in the cause, the Master was directed to inquire and state whether Mary Bilton was living or dead, and, if dead, when she died, &c. The Master reported that Mary Bilton died in 1821, that date being seven years after she was last heard of. The evidence in support of this finding was given by a person, not a relation, who deposed that Mary Bilton in 1809, or 1810, when she was about sixteen or seventeen years of age, clandestinely left the house of her father, who was a small farmer in Yorkshire, and that she had not been heard of since the year 1814, when she wrote a letter to her sister, dated at Portsmouth, and announcing her intention to go abroad. The court considered the Master's report to be grounded upon insufficient evidence, and refused accordingly to confirm it. The Vice-Chancellor of England: "It strikes me that there is considerable difficulty about this case, which, like every case of the same nature, must be determined by its own peculiar circumstances. Here a girl, about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house, and to go no one knows whither. But it seems that in August, 1814, she was at Portsmouth, and that she then intended

to go abroad. Therefore it is but reasonable to presume that all along she had been concealing herself, and that she never intended to return home. The mere fact of her not having been heard of since 1814 affords no inference of her death, for the circumstances of the case make it very probable that she would be never heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time? The old law relating to the presumption of death is daily becoming more and more untenable. For, owing to the facility which travelling by steam affords, a person may now be transported in a very short space of time from this country to the backwoods of America, or to some other remote region, where he may never be heard of again."

5. *DINNING v. HENDERSON.* 2 Coll. 330.

Practice — Administration of Assets.

The plaintiff, as a trustee under the will of the testator in the cause, filed a bill against the *cestui que* trust for the administration of the real and personal estate of the testator. Part of the real estate had been specifically devised for the payment of debts: but as this provision was insufficient for the purpose, it became necessary to resort to the general real estate under the act 3 & 4 William 4. c. 104., and the question then arose, whether in a suit not instituted by a creditor, a decree for a sale could properly be made. The Vice-Chancellor Knight Bruce, however, declared the real estate assets for the payment of debts, and decreed a sale accordingly.

6. *CRISP v. PLATEL.* 8 Beav. 62.

Discovery — Production of Documents — Practice.

No rule is better established than that a mortgagee has a right to retain his title-deeds, and refuse every request or demand for their production until he has received payment of his principal and interest in full. But in this suit, which was for the redemption of certain mortgages admitted to exist, the plaintiff contested the validity of one mortgage of November, 1823, and prayed a declaration of its invalidity. All the deeds were admitted by the defendant to be in his possession, and, on a motion for the production of them, the question arose, whether the plaintiff was entitled to an inspection of the disputed mortgage-deed. It was

clear that the plaintiff could not call for the production of the other deeds; but on the ground that the right to the equity of reduction in the mortgage of November, 1823, was in controversy, he insisted that the court could not do justice without ordering the production of the deeds relating to it.

Lord Langdale, M. R.: "I am of opinion that I cannot make this order. I think it would be as well, if every document relating to the matters in controversy were, in all cases, ordered to be produced; but while a rule exists, it must be acted upon. If the mere allegation in a will that a mortgage was bad, and was contested, would entitle a plaintiff to its production, a defendant might, in every case, be deprived of his right to resist the production."

III. POINTS IN THE LAW OF PROPERTY.

1. 2. Copyholds. Seizure *quousque*. Refusal to admit Heir. Custom as to Limit of Time for Admittance. 3. Voluntary Conveyance. Charity. 4. Statute of Limitations. 5. Maintenance. Pretenced Title. 6. Guardianship. Revocation of Appointment. 7. Property. Privilege. 8. Estate *pur autre Vie*. Devise. Construction. 9. Power.

1. Doe v. HARRISON. 6 Q. B. 631.

Copyhold — Seizure quousque — Refusal of Lord to admit Heir, on Suggestion o Right in other Parties.

Copyhold lands were devised to the London Annuity Society. The Society, however, did not claim admittance, and were not admitted. Proclamations were made for the heir of the testator; and no one appearing on the third proclamation, the lords of the manor seized *quousque*. The lessor of the plaintiff afterwards demanded admittance as heir at law of the testator; and the lords refusing, on the ground that the devisees might be entitled, he obtained a rule nisi for a mandamus, commanding them to admit him. On cause being shewn, no one appeared for the society, and the court, by consent of the parties, directed that the party claiming as heir should bring an action of ejectment against the lords; and that the rule for a mandamus should be enlarged until after the trial. On the trial the lessor of the plaintiff proved his pedigree, and the jury gave a verdict for plaintiff. A motion was afterwards made to enter a nonsuit. The plaintiff showed cause against this rule, and supported the rule nisi for a mandamus. — Lord Denman, C. J.: "There is no doubt in this case. The

plaintiff proved his title; and nothing was stated in evidence against it: he was therefore entitled to succeed in the action. And he is entitled to a mandamus because he is the heir, and there is no adverse title to prevent his admittance." Coleridge, J., "The seizure *quousque* makes no difference in the right of the heir. The lord seizes only till the tenant comes in: that seizure does not give him any adverse title."

2. DOE v. COOMBES. 6 Q. B. 535.

Copyhold — Custom as to Limit of Time for Admittance.

The customs of the manor of Hackney were settled by a private Act of Parliament, which provided that every surrenderee *ought* to come, within three years after the presentment of the surrender, and be admitted and pay his fines. In this case there had been a conditional surrender, by way of mortgage, in April, 1816, and the surrenderee was admitted in April, 1820; and the question was, whether, under such circumstances, the surrenderee could maintain ejectment against the surrenderor and those claiming under him. Lord Denman C. J.: "On the part of the lessors it was contended, that, with regard to surrenders of every kind, the custom was to be taken as binding only between lord and tenant, and not in favour of third persons, so as to make an admittance after the three years void; and that, at all events, in respect of a conditional surrender, it would not so apply, where by the intention of the parties, no admittance might take place at all, and none would be contemplated until a breach of the condition. It is unnecessary to consider the latter point, because we agree with the plaintiff on the former. The force of the word 'ought,' in the recited item, is equivalent to 'it is the custom;' and the obvious intent of the custom is, that the lord should have his real tenant on the rolls, and know who he is, within a given time, and receive the fine for alienation to which he may be entitled. If the custom be not observed, the lord may insist upon it, and enforce it by such remedies as the customs may give him, seizure *quousque* or otherwise; but he may also waive it, and he does so by the act of admittance. To the defendants, who are the personal representatives of the surrenderor and mortgagor, and who stand in his place, the delay of the admittance works no prejudice; and it would be most unjust to allow them to avail themselves of it to defeat the lessor's security. The judgment will be for the plaintiff."

3. CORPORATION OF NEWCASTLE v. ATTORNEY-GENERAL.

12 Clark & Finn. p. 413.

Voluntary Conveyance — Charity.

In this case the House of Lords decided that a voluntary conveyance of real estates to a charity, viz. for the foundation of a hospital under the powers of the stat. 35 Eliz. c. 7. s. 27., could not be avoided or defeated by a subsequent conveyance of the same property for a valuable consideration.

4. THE COMMISSIONERS OF DONATIONS v. WYBRANTS. 2 Jones &

Latouche, 182.

Statute of Limitations — Charity.

In this case the testator devised lands upon trust to convey the same to the use of Joseph H. Wybrants for life, subject to four annuities, which were to commence upon the death of Sarah Wybrants. Three of these annuities were payable to charitable institutions. The testator died in 1796, and Sarah Wybrants died in November, 1815. The testator's will was proved; and in May, 1796, advertisements of the charitable bequests were repeatedly inserted in the *Dublin Gazette*. The tenant for life continued in possession until the filing of the bill in 1843; but no conveyance upon the trusts of the will had ever been executed by the trustees. Twenty-eight years had elapsed since the decease of Sarah Wybrants, and the question was, whether or not the charitable legacies were barred by the stat. 3 & 4 Wm. 4. c. 27.

Lord Chancellor Sugden: "This statute bars all legal rights, and does not contain any saving in favour of charities . . . and I shall assume that the right to the annuities in this case, if legal, is bound at law. Now, the old statutes did not interfere with equitable rights; but equity, in analogy to the legal provisions, held time to be a bar, except in some peculiar cases, of which charity was the leading one. The new statute no longer left courts of equity to act by analogy; but expressly enacted that no person claiming any land or rent in equity, should bring any suit to recover the same, but within the period during which, by virtue of the provisions in the act, he might have made an entry or distress, or brought an action to recover the same, if he had been entitled at law to such estate, interest or right, in or to the same, as he shall claim therein in equity. This, therefore, is quite as imperative as the enactment binding legal estates. No person can bring any

suit but within the legal limitation. This leaves to equity no discretion. The statute deals generally with equitable rights, and treats them thus far on the footing of legal interests. Then comes the exception in s. 25. . . . And the statute then provides for the case of fraud. Now, it appears to me, that unless the case can be brought within this saving, which operates between trustee and *cestui que trust*, it would fall within the general prohibition in s. 24. For charities were only saved in equity from the operation of the former statutes as trusts, although highly favoured ones; and now all trusts are barred by s. 24., unless saved by 25. . . . Is, then, the provision for the annuities to charities an express trust within s. 25.? It certainly is so, if the trust to convey is to be considered as still in existence; for the conveyance can only be properly made by securing the annuities; and the trustees have a power of leasing, and there is a direction to pay the annuities which would apply to the trustees. They are trustees for the trusts declared until they convey; and these are all express trusts. If the case is now to be considered as if the devisees

5. DOE v. EVANS. 1 Common Bench Rep. 717.

Maintenance — Pretenced Title.

This being a case involving the consideration of an ancient statute rarely coming under the attention of practitioners, a short notice of the point involved may be useful to the student. Evan Richards died in 1828, possessed of a term. He had a brother, of the beneficial interest had acquired the legal estate subject to the charge, I should still be of opinion in favour of the charities. In the first place, the devisees must be considered to have acquired the legal estate from the trustees; and if not, yet the charge for the charities would, I think, create what in this court must be deemed an express trust within section 25. . . . The testator gives the estate to one, subject to this charge. Who is to pay the annuities but the person who is liable to the burden? and this, in the case of a charity, impresses him with the character of a trustee for the charity. By the ancient rule of equity, no one could acquire an estate with notice of a charitable use without being liable to it. The statute has not altered the rule in equity, which must still prevail where the charity is not bound by section 24., or is within the saving in section 25. . . . Upon the whole, therefore, I have satisfied myself that, even upon the strict construction of the statute, the plaintiffs are entitled to the relief which they pray."

Jenkin Richards, who occupied the premises during Evan's life, and continued in possession after his decease, and until 1829 when Jenkin Richards himself died, having previously devised the premises to the defendant Evans. There was no former evidence of the nature of Jenkin's tenure; but the defendant continued in undisturbed possession till 1841, when the lessors of the plaintiff, after making various attempts to turn him out, induced Thomas Richards, the next of kin of Evan Richards, to take out letters of administration of Evan's effects, and to assign Evan's supposed interest in the premises to Protheroe (one of the lessors of the plaintiff) for 10*l*. Thomas Richards, however, had neither gained possession of, or made any claim to, the premises under his letters of administration. Under these circumstances, it was objected by the defendant that the title of the lessors of the plaintiff was invalidated by the stat. 32 Hen. 8. c. 9., which enacts that "no person or persons, of what estate, degree, or condition soever he or they be, shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have *any pretended rights or titles*, or take, promise, grant, or covenant to have any right or title, of any person or persons, in or to any manors, lands, tenements, or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain that he that shall make any such bargain, sale, promise, covenant, or grant do forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted contrary to the form of this act; and the buyer and taker thereof, knowing the same, do forfeit also the value of the said lands, tenements, or hereditaments so by him bought or taken as is above said." The principle of the common law with reference to such cases was also cited, as laid down in *Underwood v. Lord Courtown*¹, where Lord Redesdale said: "A person out of possession cannot in law *convey* anything to a stranger; he can give only a release to one in possession; and the law has wisely provided this, in order to quiet possessions." Tindal C. J.: "This appears to me to be a transmission which it was the very object of the statute to prevent. It is a case in which one man, being in quiet possession of an estate, another man buys a supposed title, and brings an

¹ 2 Scho. & Lef. 65.

action upon it. . . . It has been contended that the effect of the statute is not to make this a void conveyance, but only to deter parties, by means of a penalty, from entering into such transactions. If this had been the only effect of the statute, there would undoubtedly be nothing to interfere with the plaintiff's right to recover in this action. It seems to me, however, on the authorities, that the act has a much wider extent. The course of the common law was well known at the time, and the statute was not intended to alter it, but merely to superadd a penalty. . . . It seems to me that by analogy to all the cases which prohibit parties from maintaining actions in respect of contracts that are entered into in violation of the provisions of Acts of Parliament, that here the lessor of the plaintiff is precluded from coming into Court to assert the validity of a conveyance, which the statute has expressly prohibited. I think the rule for entering a verdict for the defendant should be made absolute."

6. *In re PARK.* 14 Sim. 89.

Guardianship — Revocation of Appointment.

A testator appointed four persons, named Petty, Kennedy, Hudleston, and Park, to be his executors and trustees; and by a separate clause in his will he appointed the same four persons *by name* guardians of his children jointly with his wife. He afterwards made a codicil revoking the appointment of Kennedy, Hudleston, and Park, as three of his executors, and substituting two others in their places. The Vice-Chancellor of England held that the codicil had not disturbed the guardianship, and declared that Petty, Kennedy, Hudleston, and Park and the widow were the guardians of the testator's infant children. His Honour proceeded on the ground that the testator, in appointing his executors to the guardianship, had mentioned them by their names, and not by their official designation as trustees or executors.

7. *CALCRAFT v. WEST.* 2 Jones and Latouche, 123.

Property — Privilege.

The difference between property and privilege is very clearly illustrated by the present case. Copyrights and patent-rights are, by law, the subjects of property; and they may be said to combine in themselves both property and privilege. The owner of such rights can sustain an action for damages in case of a piracy or infraction; or he may apply to a Court of Equity for an injunction

to restrain the commission of the wrong. But where a man enjoys by way of privilege a special right to do an act which in the first instance every individual member of the community is by law expressly prohibited, under a penalty, from doing, unless by a license for that purpose, there it appears that the licensee's privilege, as between himself and other persons, consists merely in an exemption from the penalties attendant upon a breach of the law, but gives him no right of action or suite against another person, who assumes to exercise the like privileges without a license.

The material facts of the present case are very short. By the stat. 26 George 3. c. 57., the Crown was empowered to grant letters patent for establishing and keeping one or more theatre or theatres in the city of Dublin: and by another section of the act, all persons were prohibited from acting any play of any description on any stage or in any theatre in Dublin, except in the theatre or theatres to be established by such letters patent as aforesaid, under a penalty of 300*l.* for each offence — one moiety to be paid to the governors of the lying-in hospital, and the other to the person who should sue for the same. The plaintiff became proprietor of letters patent giving authority to keep a theatre in Dublin, and containing a clause prohibiting all other persons from so doing. The defendant West having caused several dramatic pieces to be performed in the Abbey Street Theatre, for which no license or patent had been issued, the plaintiff filed his bill for an injunction to restrain such performances. The Court, however, refused the relief; and in the course of the argument put the question whether, in the case of a license to keep a public-house, the licensee could maintain an action on the case against another person for opening an unlicensed house. Lord Chancellor Sugden: "The rights of the parties depend on the 26 G. 3. c. 57., by which a power was given to the Crown to grant letters patent for keeping a theatre or theatres in the city of Dublin and the county of Dublin; and by the second section no person is, for hire, to perform any play, &c. in any theatre within the city or county, save in such theatre as shall be so established by letters patent, under a penalty of 300*l.* for any offence, to be recovered at law by any person who shall sue for the same. The prohibition and penalty, it will be observed, are in the same clause. This prohibition would, in the first instance, operate against all the world; and a breach of it could not be prevented by this Court, but would subject the offending parties to the heavy penalty imposed by the act. So that there is no original juris-

diction. It is contended for, on the part of the plaintiff, that he has a *property* in the patent, which entitles him to an injunction, and that he could bring an action on the case. On the part of the defendants it is stated, and not denied, that no such action has even been brought. The plaintiff relies upon the prohibition in the patent against other persons performing; but this appears simply to confine the authority to the patentees, for the act of parliament itself contains the prohibition, and restricts all persons but the patentees from keeping a theatre In my opinion the plaintiff can only maintain the bill upon the ground of interest. Unless therefore he could sustain an action on the case, the injunction, I think, cannot be supported. For the prohibition is general, and the aid of this court is not required to give effect to it. After the patent was granted the patentee was no longer subject to the prohibition, he was excepted out of it; but it remained in force as to the rest of the world; and the remedy for a breach was not altered, although it was restricted by the authority given by the patent. The patentee, after the grant, had, as a person who could sue for the penalty, just the same right to punish an infringement of the prohibition as he had before, but no higher or greater. The public had still the same security under the act of parliament The result of my consideration of the act of G. 3., and of the authorities bearing upon its true construction is, that the plaintiff has only, in common with the rest of her Majesty's subjects, a power to sue for the penalty as a common informer—that he has not any right of property under the license which would enable him to maintain an action on the case, notwithstanding the remedy given by the act; and that this court has no power to grant an injunction. The bill, therefore, must be dismissed with costs.”

8. WALL v. BYRNE. 2 Jones & Latouche, 118.

∴ *Estate pur auter Vie — Devise. — Construction.*

The short point of this case arose upon the will of Luke Wall, the lessee of lands, which were demised to him, his *heirs and assigns* for the term of three lives, with a covenant for perpetual renewal. He devised his interest in the lease in the following terms:—“And as for and concerning all my real freehold and personal property, which I now possess, or am entitled to, I give, devise, and bequeath the same, and every part thereof unto my wife, and my children, Margaret, Anne, &c., share and share alike.” Two of the children died unmarried and intestate: and

as the testator named no special occupants in his will, the question was, whether the heir or the personal representative of the deceased children became entitled to their shares in the estate *pur auter vie*. Lord Chancellor Sugden : "I cannot permit this to be argued. If even a point was closed by decision, it is this; that where a man has an estate *pur auter vie* limited to him and his heirs, and devises that estate by words which, without words of limitation, would pass the *quasi* inheritance — as the words here would — and the devisee dies intestate, the persons to take are the heirs, and not the personal referees of the devisee. The point was so decided in this country many years since; and that decision has been followed in England¹, and many opinions have been given upon it. I must, therefore, decline to hear the question argued: for I will not be auxiliary to unsettle settled opinions. The case of *Doe v. Lewis*² is distinguishable. There the devise was to a man and his assigns, which, it was held, did not make *heirs*: but in this case the devise is in general terms, and in words which are sufficient to pass the entire interest under the lease. If this had been a fee simple estate, it would have gone to the devisee and his *heirs* under the terms of this devise. The testator gives all his interest in the lands of his devisees; and both law and good sense require that they should take the same interest which he himself had."

9. LOGAN v. BELL. 1 Common Bench Rep. 872.

Power — Time of Execution.

The plaintiff, George Logan, married Isabel Wight in 1825, and in contemplation of the marriage a settlement was executed, by which lands of Isabel Wight were settled to the use of herself and her assigns until the marriage, and from and after the marriage to such uses as she, notwithstanding her coverture, should, at any time or times, and from time to time, by deed, or will, or codicil appoint; and in default of such application, then, during the joint lives of the plaintiff and his wife, in trust, to pay the rents and profits to Isabel for her separate use, and after the decease of either Logan or his wife, to the use of Isabel, her heirs and assigns for ever. Two days after the execution of the settlement, but two days *before* the marriage, Isabel made a codicil to a will which she had

¹ See *Blake v. Jones*, 1 Hud. & Bro. 227, note; *Philpot v. Jones*, 3 Doug. 425.

² 9 Mees. & W. 662.

executed some months previously, and in a clause expressly referring to the power conferred upon her by the settlement, she devised the lands in trust for the children of the marriage, and in default of children, then in trust for Logan for life. Under this appointment the plaintiff Logan claimed an estate for his life, and the question in the cause was, whether there had been a valid exercise of the power. Tindal, C. J. : "It is no objection to a power, that the party exercising it has a fee or other interest in the land. This is clear from many cases, as Sir Edward Clere's case⁽¹⁾, *Maundrell v. Maundrell* ⁽²⁾, and other cases there cited. Nor is there any weight in the objection that the execution of the power was to operate after an event (the marriage), which was contingent at the time the power was extended: see the cases of *Dalby v. Pullen* ⁽³⁾, and *Sclater v. Travell* ⁽⁴⁾, which show that a power may be effectually exercised, though at the time of its exercise it is uncertain whether the event on which alone it could take effect will ever happen. Nor is there any doubt, that, supposing the power in the settlement to extend to a codicil made after the settlement and before the marriage, the application by the codicil was not revoked by the marriage, according to the language of Lord Kenyon in *Doe v. Staple*, where, after stating that, generally speaking, 'the will of a femme sole ceases to have any operation after she becomes covert,' he adds,—'but it is equally clear that, where an estate is limited to uses, and a power is given to a femme covert, before marriage, to declare those uses, such limitations of use may take effect; and this is the rule even in a court of law.' And the exception in the Act of 7 W. 4. and 1 Vict. c. 26. s. 18., which excepts (from the enactment making marriage a revocation) a will made by a woman under a power of appointment, when the estate would not, in default of appointment, pass to her heirs or next of kin, &c., assumes that, before the Act, a will of a woman under a power of appointment would not be revoked by her subsequent marriage. There seems, therefore, to be no doubt, that a power to appointment by a codicil made before marriage, may, by proper words, lawfully be conferred, and may, if duly exercised, take effect notwithstanding the subsequent marriage. Nor is there any doubt, that if Isabel Wight had such a power, it was effectually exercised by the codicil, which expressly refers to the power, and is in all respects strictly within its terms, if it be so with respect to the time of its execution.

¹ Co. Rep. 17 b.

² 2 Bing. 144.

³ 10 Ves. 246.

⁴ Vin. Ab. Authority.

The question, therefore, is, whether the power given in the settlement did authorise an appointment before marriage. The language of the clause conferring the power is full and precise, and it relates to the time when the circumstances under which, and the form and mode by which it may be exercised. . . . We think that the intention of the settlement was to confer a power to appoint before as well as after the marriage, and that that intention was effectually expressed." Judgment for the plaintiff.

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POSTSCRIPT.

W^e have already expressed our hope and belief that the present Ministry was not only well disposed towards the cause of the gradual improvement of the Law, but that they were prepared to carry forward the good work. We have as yet no sufficient reason to change, or even modify, this opinion. Several valuable Acts for the reform of the Law were passed under their auspices, at the close of the last Session, which we have either already noticed, or shall now advert to. But, while we express this opinion, it is our duty to notice a circumstance which occurred since the accession of Lord John Russell's government to power. Four Bills came down from the House of Lords, all of which were brought in by Lord Brougham. With respect to two of these, doubts were entertained; viz. a Bill for shortening Conveyances, and a Bill for amending the Bankrupt Law. With respect to the first, the most important of all, it was determined that no further progress should then be made with it. We believe that it might have been carried, but its friends all agreed that, considering the state of the House and of the Session, it was unwise to attempt to pass so important a Bill. The advice which we humbly gave respecting it in our last Number was taken (4 L. R. 397.). "Unless it can be properly considered, it might be advisable to withdraw it till a fitter season. The present unsettled state of parties is, we fear, unfavourable to it. It is too important and too extensive a measure to be hurried through in the midst of party conflicts." This Bill, then, was withdrawn by consent immediately it reached the Lower House. The same course was taken with respect to the Bill for amending the Bankrupt Law. But there were two other Bills to which no one had raised a shadow of objection. One of these was a Bill having for its object to simplify and systematise the laws, scattered over some two or three score of statutes all on the same matter, the protection of Magistrates and others acting under authority of the law; but the provisions all varying in a manner most injurious to the object in view, and most embarrassing to the Judges, and constantly complained of by them. The Bill was carefully prepared, had been submitted to the Judges, and highly approved of by several of them, with some amendments which they had suggested, and which Lord Brougham had adopted. All the Law Lords, including the Lord Chief Justice and Lord Campbell, had entirely approved of it, and it had passed the Lords without a dissenting voice. The absurdities and inconsistencies of the existing law had, indeed, been so plainly shown to be a disgrace to the Statute Book, that every one rejoiced in the change. There could, in fact, be no doubt as to the Bill. It was good in itself, and it was likely to lead to others of the same comprehensive, but useful nature. The other Bill was to remedy one of the most flagrant defects in the Insolvent law, whereby, after an insolvent had passed his estate to the assignee, he is deprived of all means of obtaining the property to which he may have a legal or equitable claim, the Commissioners having no power to make the assignee join in any suit, even on full indemnity being offered, and on an obligation given to confining the whole fruits of the suit to the assignee. This Bill was also objected to by no one. And yet neither of these two last Bills were carried. Having made some inquiries, we really

are unable to find out on whom the blame rests, and, of course, we can blame nobody. We only trust, that in future, a Bill for effecting the real amendment of the Law, having no party object, will not be opposed or passed over because a particular Peer's name is on the back of it. All that we can prove in the present case is, that the blame of malfeasance, or non-feasance, lies *somewhere* in the House of Commons. Perhaps this circumstance shows more than ever the necessity for appointing a **MINISTER OF JUSTICE**, whose duty it should be to superintend all reforms in the Law, and its administration.

This seems a fitting occasion of mentioning, that none of these Bills proceeded *directly* from the Society for promoting the Amendment of the Law. With two of them that Society had nothing whatever to do. The other two, the Conveyancing Bill and the Magistrates' Protection Bill, were founded on the Reports of the Society, but were drawn by individual members, and for *the Bills the Society is not responsible*. This should be distinctly understood, otherwise the Society would be guilty of great inconsistency. They have no machinery for drawing Bills, and they have urged upon the Government and the Profession the necessity of appointing a Revising Board for this purpose; and this proposition we believe will be carried. We are desirous of making this explanation, because some misapprehension has existed in certain quarters respecting it.

The approaching Term will have considerable professional interest. The vacancy, caused by the death of Mr. Justice Williams, in the Queen's Bench, is to be filled by Mr. Justice Erle, and Mr. Vaughan Williams is the new Judge in the Common Pleas. This appointment has given great professional satisfaction. The opening of the Court of Common Pleas to the whole Bar, under the 8 & 9 Vict. c. 54., the great abilities of the new Chief Justice, and the sound law of the new Puisne, will, we doubt not, attract a large quantity of business to this Court. It must be remembered, however, that it has not the Crown business of the Queen's Bench, nor the Revenue business of the Exchequer; and that, moreover, the mode of taxation in the Court of Common Pleas is not so satisfactory as in the other Courts. This last point may be rectified. There should be a uniform mode of taxing in all the Courts. While we are adverting to this Court, we wish to state, that Mr. Serjeant Talfourd and Mr. Serjeant Manning have been made Queen's Serjeants.

Lord Campbell's two Bills, to abolish Deodands, and to provide Compensation for Persons killed by Accident, have passed into law. They are now 9 & 10 Vict. c. 62 and 93. They are highly useful and practical measures, and we hope to be able to discuss their provisions at length in a future Number, in connection with another interesting subject, the Condition of Labourers on Public Works, as to which Mr. Bouverie obtained a Select Committee last Session, which has made a very able Report.

We understand that a Bill is in preparation for consolidating and amending the law of Debtor and Creditor.

In our last Number, p. 444., we mentioned the present state of the deliberations of the Inns of Court on the subject of Legal Education. The newspapers have been misinformed on this subject. Although the Committee have come to the resolutions stated by us, the main body of the Benchers *have not confirmed them*; and even at the Middle Temple, in which we stated that more progress had been made, it is considered necessary to have a further Parliament before any advertisement of the new Lectures is issued. We do not doubt, however, that there is every disposition on the part of the Benchers to satisfy the wants

and wishes of the public and the profession in this respect. The Report of Mr. Wyse's Committee on Legal Education, will speedily appear; and in the mean time a writer in the "Edinburgh Review," after quoting some of the arguments in one of our recent Articles, which go to prove that the Benchers are Tax-ras¹, speaks out thus plainly on the subject:—"If the reform does not come from within, it will come from without; and it is absurd to suppose that inquiry can be fenced off again, as it was fenced off fourteen years ago, by talking of voluntary societies, private property, and irresponsible power. It is now established, beyond all question, that the governing bodies of these establishments are, to all intents and purposes, trustees for the public, and, as such, the legislature will deal with them." We know enough of the present feelings of the House of Commons on this subject to be able to say, that there are good grounds for this suggestion. We also wish to mention, that the opinion that a compulsory examination shall precede the granting of any law degree, also gains ground. We hope that before the new year comes, the whole of the preliminaries, on this subject at least, may have been settled.

We have received a letter from the body of Articled Clerks, to whose claims we called attention in our last Number, complaining that they are shut out of the library at the Law Institution. It is said that they are so excluded as not being clerks of members of that Institution; but we think it would be more liberal on the part of that body, if it be necessary, to obtain an alteration in the Charter in this respect. They would stand on higher ground, if they thus encouraged all law students of this branch of the profession.

We are not in the habit of noticing *rumours*, but there are two which have come to us on authority which we deem so good, that we shall depart in this case from our practice. The first is, that the Duchy of Lancaster is henceforth to be governed by a Board; the second is, that the punishment of Transportation is abolished, and will not again be inflicted by the Executive Government.

Oct. 28. 1846.

¹ See 4 L. R., pp. 183, 189. It is fair, however, to state, that this reasoning is not new. It was pursued at great length, and the principle incontestibly established, by a writer signing himself "*A Cestui qui Trust*," in a series of articles in the third volume of "The Legal Observer," as far back as the year 1832.

THE LAW REVIEW.

ART. I.—RECOLLECTIONS OF A DECEASED WELSH JUDGE.

No. V.

AN, me! How the men of this world as well as its fashions pass away! Here have I also outlived Sir Arthur Piggott! I was well acquainted with that good sample of our older lawyers, and I never knew a better man. He was uprightness and honour itself. His nature was kindly, and his temper equable and mild; but his opinions, like his principles, were inflexible; and trying to convince him on any point which he had well and deliberately considered would have been a somewhat hopeless task; nor did he ever form, at least give out, an opinion that he had not well and deliberately considered. "Let us see," he would say—"Let us see—have I been all my life dreaming when I thought that, in construing the gift of a future interest, you never shall take it to be an executory devise if it *can* be taken as a contingent remainder? Have I been always dreaming in so regarding it? Then is there not a precedent freehold estate plainly here given to Mister John Thomson, and will not that suffice to support the estate in remainder limited to him thereupon?"—"I suppose," he would add—"I fancy I know little about it—or have peradventure forgotten what I might once have known—but I cannot for the life of me understand what my Lord Chief Justice Gibbs means, and I much question if my Lord Chancellor will be satisfied with his Lordship's certificate."

He was of profound and accurate knowledge of the

law in all its branches, and knew common law as well as he did equity, having indeed long gone the circuit, on which Lord Erskine showed a great degree of bitterness towards him — the solitary instance of his amiable nature being so perverted by professional rivalry. For Piggott took his rank as king's counsel under Lord Erskine, though his senior at the bar, and both were made at once. They went together the Home Circuit, where Piggott, having before led him, was probably dreaded by him, and all the more for that he was so excellent a lawyer. He was, however, not fitted for *Nisi Prius* — having a want of readiness, that rendered his deep knowledge and familiar acquaintance with all legal points, little available before a judge and jury.

In Constitutional Law he excelled all the men I have known, and for this, all the more that his opinions were purely Whig, he was looked up to with the most undeviating reverence by Mr. Fox and all his party. They might regard "The Sergeant," as they called Heywood — with respect as a good sound lawyer, and well read in constitutional lore — but to Piggott they deferred with much more unhesitating confidence and submission. "The Sergeant" was so familiar with them that he always, speaking of Mr. Fox, said, "Charles thinks this," or "Charles will do that." Modest retiring old Pig (as we called him, and sometimes "the learned Pig,") would never so speak, any more than if it were profanation — but said, "Mister Fox is of opinion," or "Mister Fox, it is to be hoped, will see fit to do so," and he would even say of the Sergeant's habit, "you see the coif has its privileges, and the Judges call him brother Heywood." Fox once said, drolly enough, when some one was questioning if Piggott was a very clever man, "You might as well doubt if he is a very ugly man." But I have heard this differently given. It is sometimes said that his beautiful daughter being mentioned with wonder as *his* daughter, and one saying, "Well I don't think, for a man, he is so very ugly," Fox said, "You might as well say he is not a very clever man." I am quite clear that my version is the correct one.

I have named Gibbs. For him Piggott had but a very

moderate respect. "Why, Sir, he surely is a good lawyer," we would say. "Why he is a very good special pleader (Piggott would answer), and will put you a point well enough and roundly enough, but before I will call him a good lawyer, I must take time to consider, as my Lord Chancellor has it. His mind is excessively narrow, and I don't much think it can be what is really to be deemed and taken to be that of a good lawyer." I once heard him say,— "Why really, if Sir Vicary remains long in the Common Pleas, he will change the law of real property, and I know—observe I *know*—my Lord Chancellor, who is a consummate lawyer, is not of another opinion." On somebody saying,— "Why, I don't suppose Lord Eldon to have been so rash in giving an opinion after promoting him three times." "Never you mind—never you mind—a bird has whispered in my ear, and I know—observe me—I *know* what I am mentioning." This same bird had frequent access to my worthy old friend's ear, and was not rarely cited in his cautious and sly conversation.

He did not much like though he much admired Lord Eldon. He fell into the common error of thinking him overparsimonious, and one night, when Mr. Lushington, on the Treasury Bench, was arguing in behalf of an income tax,—that it made a man who would live as a miser, pay like a gentleman, Piggott turned round to Romilly and said—"He is plainly referring to the case of my Lord Chancellor." The Tory principles of Lord Eldon were, however, his chief object of aversion, and he was wont to say,— "Oh, if I could but live to see the Great Seal out of his gripe, I should say, *nunc dimittis*." Not that he dreamt of its falling into his own less tenacious grasp, for on my saying that the Chief Baron was supposed to be ill when he was Attorney-General in 1806, he said,— "In that matter I have no kind of interest, and Mr. Solicitor (then Romilly) would not take it either." He then said that he never would accept any judicial place whatever, and that if things, contrary to all probability, lasted long enough, the place of Accountant-General was what he should prefer. His objections to act as a criminal judge, especially in the then state of the law relating to capital punishments, were altogether insuperable.

He was very far from being a fanatic in religion, or indeed from ever showing much outward indication of a sacred character; but he was a regular Church-of-England man, and exceedingly disliked all enthusiasts. Possibly his West India connections (for he had practised in the Colonies, where his family had been planters, and his brother Elphinstone was in a legal office,) increased his dislike of the abolition leaders, against whom he always acted as counsel on the Slave Trade question. I once said I was going to take my seat after the General Election. "I will take you to-morrow," said he, "when the crowd is over, and then you see, we shall be able to do it more condignly." So together we went in his carriage, with his ancient coachman not very unlike himself. I recollect on the way, speaking of some points of proposed reform in our Liturgy, suggested by the ceremonial we were about "condignly" to go through. I mentioned one plain abuse after another, saying always—"Don't you think so?" "No," he answered, "I am of the Church of England *as by law established*," dwelling much on these words; and when I instanced at last the Athanasian Creed, he was still inflexible: "I am, you see, of the Church of England *as by law established*." I could get nothing more from him.

He was very fond of Harry Martin, once a well-known Equity Draftsman, and now a King's Counsel¹, the lineal descendant of the Regicide, and I believe possessed of Colonel Hacker's house and estate. Martin's inexhaustible fund of private anecdote pleased his ancient friend, and also he wholly approved his sound Whig principles—to say nothing of the victory he had gained, in Spring 1807, over Perceval (whom Piggott could not abide, calling him "little *Peerceval*"), preventing him, by his successful motion, from getting the Duchy of Lancaster for life. In consideration of these qualities possessed, and of that service rendered, Piggott passed over the blot in his descent; for with genuine Whig feeling he loved monarchy and abhorred regicide, especially when conducted by an irregular trial. Other men called him, as they still do, "Harry Martin," but Piggott always called him "Henry Martin," and often Henry alone: and he would say—"You

¹ He long ago retired from the Bar, having been afterwards a Master in Chancery, and has since died. — ED.

see, Henry Martin and others tell me—but I mention Henry, because he is so likely to know and probably has given himself trouble to satisfy himself, you perceive.” Leech was his protégé and pupil—or if not his own pupil, was at his request taken by some one gratuitously as a pupil, from having been known to him in the humble capacity of a poll-clerk at the famous Bedfordshire election in 1780, when Garrow, as assessor, laid the foundation of his success at the Bar. Piggott was there counsel for the Whig candidate, and saw Leech’s activity and ability. He had been only a clerk in Sir Robert Taylor the architect’s office. When Leech, from having been his humble protégé, first became his rival, and indeed almost immediately distanced Piggott, whose business, never perhaps first-rate, fell greatly off as his years and his slowness increased, his excellent nature bore it better and more meekly than Leech did his faculties. But he would have ever and anon a sly word at his friend’s cost and charge. One day he said to me,—“Have you seen the *Observer* Sunday paper?” “No,” I said, “I never read it or any Sunday paper.” “Well then, go and read the *Observer* Sunday paper.” But I in vain asked what I was to read in it, or wherefore I was to read it at all. He would only say—“Never you mind—only look you at the *Observer* Sunday paper—that’s all.” I did, and I found a paragraph that Leech was to be immediately elevated to the Peerage by the title of Baron Seaford, of Seaford, in the county of Sussex, of which place he was recorder, and also boroughmonger, and member.

Whishaw, whom Piggott highly esteemed, as do all who know that excellent and well-informed and worthy man, (and who had been his devil in 1806, when the name of *diable boiteux*¹ was given him), used frequently to pass a week with him in the country in the Isle of Thanet, where he had a villa. I have heard him say it was curious to hear Sir Arthur give advice to his country neighbours, so very different from what romances describe as the legal habits. It was always

¹ Whishaw had lost one leg, and had a false one well contrived, but still he halted in his gait.—Ed.

to avoid a lawsuit "as the second misfortune, do you observe, which can befall any one." But when his consulter would ask what then was the first? "Was it death or what?" "No," said the worthy old Pig. "No, not precisely that — but worse. I meant a Chancery suit — for the grave affords some rest — and there is a set off against suffering — but the suitor before my Lord Eldon has none whatever." He himself had dreadful complaints of the bladder, which made him possibly so speak — certainly made him often, when the conversation turned on who was the happiest man, uniformly answer, "No — the man that sleeps."

He had formed a very poor idea of the happiness of a minister. Indeed, he deemed the man out of his mind who preferred politics to the law as a profession, holding it eminently insecure of tenure, and not very consistent with perfect honesty. I recollect his once saying, "when I see the wholly uninterrupted demands on my Lord Chancellor's time — the perfect impossibility of his satisfying his own conscience, if he has a tenth part as much of it as he says, the numberless claims of professional men for promotion, and of parsons for livings — and add to all this, his Lordship's constant and groundless agony for fear of being turned out, I abate much of my aversion to his keeping such a firm grasp of the Great Seal. I almost begin to feel for him." So he was much amused by hearing the saying of Pitt, when men were discussing the qualities required in a Prime Minister — one said, "eloquence," one, "good health," and so each named his quality — but Pitt said, "patience."

As for Lord Eldon, Piggott always said he knew precisely when he was, or at least felt himself, peculiarly secure of office — it was when he spoke of going out as a likely event; said, "next Term, if I should then be in office;" above all when he talked, as he frequently would do, of retiring from his labours, enjoying the repose he had earned by a life of labour, and preparing himself for that change which all men must undergo, and which he so nearly approached. "Now," old Pig would say, "you may be quite well assured both that all is well at court, that all their bickerings are made up, and also that my Lord Chancellor feels himself in the enjoy-

ment of perfect health." Nor did I ever know my old and valued friend mistaken in his conjectures on this head. Once that I was sitting by him accidentally in court he made an equally happy guess. The Chancellor was descanting pathetically and somewhat severely upon the great offence of a runaway marriage, which some counsel had rather made light of. "It is," said his Lordship, "a very serious — a very grave offence — I don't say an offence for which there can be no pardon — but one which to make it be forgotten requires a long and well-spent life ever after." "My Lord" (whispered Piggott) "is referring to his own life, no manner of doubt of it." It is known that Lord Eldon's marriage was of this kind, whatever his after life may have been.

Sir Arthur Piggott made no pretensions to oratory in any of its branches, and like all such persons, he somewhat too much, more if possible than even myself, despised it. Close argument, clear statement whether of fact or of law, he of course valued. Any thing else at the Bar he would call "Fringe, as it were," or, "air, you see," or, "all that sort of thing, you know," and he usually followed up the reference to it with a "which of course, is neither here nor there;" sometimes adding, "we ain't here, you know, before a Jury." That he had great talent for reasoning no one can doubt, any more than that his opinion was as sound as possible. Once I remember being at a consultation with him, when he clearly expounded the case, "opening to us," as it were, the law, and I well recollect that a learned Sergeant now gone to his account, (or as Sir Arthur once said with a grin, "into the Master's office,") was in attendance, and being junior to all but myself, and having expected to write down the opinion, had somewhat rashly prepared one on his brief — handing that brief over to me, I wrote, as we had all very clearly agreed, that the action would not lie, and indeed, that the point of law was clearly against our client, which we all signed. But seeing something written, I looked over it, and found the learned Sergeant had written his opinion directly the reverse, and yet he was the author of learned works on the law.

Piggott, though thus lightly deeming of rhetorical accomplishments, was not without some of the talents that lend

themselves to "fringe," "air," "mere wind," and "all that sort of thing." Once, a few months back, he came into the Court of King's Bench as leading counsel for the Bank, his old, and in those days, very valuable client, in consequence of the Forgery prosecutions, in each of which, wheresoever tried, he behoved to have a brief, and generally a consultation. A rule for a mandamus had been granted to have larger dividends made. Sir Arthur appeared to oppose the rule being made absolute (show cause), and his argument being the irrefragable one, that the Court of King's Bench never could be the place to decide what dividend should be made at any time, he began, to the great delight of the court and the bar, and almost the envy of Lord Ellenborough, by saying, "Your Lordships, if this rule be made absolute, would seem to be, as one may say, destined to new uses." It is hardly necessary to add, that the Court was little inclined to execute the use in question, and the rule was discharged.

My excellent and truly learned friend had a very strong prejudice against the Scotch. Upon what it was founded I could never exactly ascertain; nor did he much help my inquiries; for he, perhaps, felt it to be a kind of weakness, and was not over fond of avowing it — though always subject to its influence. I remember when Whishaw, once speaking of George Wilson, quoted comically enough, with variations, Pope's line on Craggs —

"Statesman, yet friend of truth, of soul sincere,"

(which the *varia lectio* made *Scotchman*), and I mentioned the jest to Piggott, observing that those present all wished he had been there. "Now," said he, "that's not at all right, for it does so happen that some of the very best men I have ever known have been from that country — and not only the person, in respect of whom the reference to Mr. Pope's verse was made — but one or two others also — at least, one certainly." I could hardly avoid smiling to see how the little weakness was operating all the while that Piggott was defending himself from the imputation. It broke out unexpectedly enough on another occasion of Lord Melville's persecution (as I, not he, termed it) by the Whigs — for the King (George III.) being

mentioned, and how much the famous vote of 8th April (1805) must have vexed him; "Why not exactly so" (said Piggott), "for you will observe he never much liked Dundas, and naturally was distrustful of him as being a Scotchman." Some one mentioned Lord Bute as his prime favourite, though of that country—but Piggott said it was a great mistake so to think, and a mere party slander, for he knew that, except just at first, the King never could bear Lord Bute, chiefly because of the stories about his mother having too much fancied Lord Bute. And "this was one cause," said he, "of the dislike of Scotchmen, but by no means the only cause, you may be quite sure."

Of the Irish he had not by any means so bad an opinion, possibly from having been so much thrown into contact with Burke, Sheridan, and above all, Fitzpatrick, who never failed to set up his countrymen as against the Scotch, and who gave the same bias to Mr. Fox's mind and feelings. But Piggott always made this very large exception—that if you wanted to know the truth of any statement, you must not go to one of that fanciful nation, who, he thought, never "seemed to regard the state of the fact as at all material, you see." He esteemed the General (Fitzpatrick) most highly, justly considering his fine sense, as well as exquisite wit, perfect in their kind, and adding always that it was impossible to conceive any person more absolutely correct and trustworthy in his statements of fact; insomuch he would say, that you might perceive, even in telling a droll story, how the General picked out carefully whatever was interesting or effective in the mere facts themselves, without even in the least degree varying one feature of form or hue of colour. In fact, Piggott would say, "It is absurd, you observe, to call him an Irishman at all, for he is only Irish by his lineage and descent, and has passed all his time among us." For Burke's judgment he had not at all the same respect—by no means because of his partaking of the national peculiarity, which he in no degree did, but because of his heated feelings and his being a bad adviser of the party. "No man, I would say, ever got us into more scrapes, while he was among us, so though one regrets any loss of a really great man from our body, yet one

can hardly, as one may say, in an interested point of view, be very sorry that he left us."

This apprehension of Burke or at least the rooted distrust of his judgment, was not confined to Piggott. Others, indeed, liked him much less. That great man was never popular in the party. He was far too disinterested, far too large in his views, to please a set of men whose only principles were to turn out the Ministers and take their places; in whose eyes there was no public virtue but sticking to one's party through thick and thin, right or wrong; and who knew no wisdom but always harping on the same string, in season and out of season, till their adversaries chanced to take up the tune, and then to alter their note and make a hideous discord. These genuine party-men never much relished the wisdom and patriotism of Burke, but also they found him a most dangerous associate when they were in the right, and were pursuing prudent courses; for he was exceedingly impracticable and violent, and took views often of a very personal nature. Thus his whole conduct of the Impeachment was most hurtful to the party, and not very creditable to himself. His unbridled violence broke out at every turn. The House, which supported him in the accusation against Mr. Hastings, passed a censure on him for charging Sir Elijah Impey with murder, and acquitted that eminent Judge of all blame after full investigation of the charges, when Sir Gilbert Elliott (afterwards Lord Minto) very ably brought them forward. The whole impeachment was Burke's own private affair, and of no possible party use; for Pitt had very unjustifiably lent himself to it, as throwing out a tub to the whale, and occupying all his adversaries for some years about nothing. Then Burke's violence in the Regency debates, and the indecency of his expressions about the unfortunate King, called down general disapproval, and made the party quite sick of him; so that it is a great mistake to fancy the dislike of Burke only arose from his conduct early in the French Revolution. On the contrary, I have some reason to believe that there was at one time no great disinclination in Mr. Fox himself to take the same view, and line with the Portland party on that great question, and then we

should have seen Fox and Pitt making war together or together keeping peace, and the good Whigs would have outrun the Tories in their loyal Anti-jacobinism.¹

The easy and kindly nature of Mr. Fox was not unfrequently circumvented by the active zeal of Burke, as it was so often by the shabby dispositions of more ignoble *earwigs*; and Piggott could with much difficulty bear the sight of one whom he so affectionately loved, and so deeply revered, being trepanned into great scrapes by the imprudence and violence of his adviser. What must he have thought of that amiable and highly-gifted man actually, — because Burke had been censured for saying that Hastings murdered Nuncomar by Impey's hands, after Pitt had given his conscientious verdict judicially, and acting as a grand juror, — getting up and declaring that the Chief Justice who condemned the man was a murderer; that his three Puisne Judges who agreed in opinion with him were his accomplices in the murder; and that Pitt, because he now refused to find a true bill of impeachment against him, also became his accomplice — not his accessory after the fact — which would have been only monstrous injustice, and indeed absurdity — but his accomplice in the crime — which, if Mr. Fox thought for a minute, must have been perceived by him to be stark nonsense — a thing he was little used to speak — or false, ignorant, disjointed, jumbled metaphor — a thing he was, if possible, still less accustomed to fall into. But he was blinded by his party-spirit, in him predominant all his life, and the cause of all his errors as a statesman; and he was urged on by the desire of saving Burke's credit, who had gone so much too far in this senseless line of attack, that his leader thought he could best save

¹ His Honour's conjectures are well borne out by Lord Malmesbury's Correspondence, lately published. It is there clearly shown that there was nothing so near Mr. Fox's heart, in 1792, as a coalition with Mr. Pitt to resist the fury of the ultra-reformers or revolutionary party, and oppose the progress of the French enormities, then become an intolerable sight in the eyes of all Europe. It is plainly proved that we were within an hair's breadth of having this important junction of parties; and that it was prevented by the sordid acts of selfish underlings on both sides cannot be doubted. Such creatures are like the vermin on the surface of two great bodies, and feel sure they must be crushed should they come in contact. — Ed.

him by going a considerable step in the same direction. All these things made Mr. Burke assuredly no idol of Sir Arthur's worship; and his great proneness towards the figures and the exaggerations of oratory no doubt added to the undue estimate which he formed of him, while no man did more real justice to his excellencies of a solid description, or more revered his public virtues.

It appears almost incredible to any one now calmly looking back on the life of Burke, that he should have been so much the dupe and sport of his own feelings as he proved himself through the whole of the Impeachment. In the other passages of his life he really seemed one of the wisest and most reflecting, and even most calm-minded, of men, if we except the *degree* in which the French Revolution was dreaded by him; for that he was in the main quite right no one now denies; and that his sagacity was perfect in foreseeing its progress and effects is undeniable; though he certainly carried his opinions to an excess in desiring the restoration of the old monarchy without any alteration at all, and especially placing so much confidence in a body utterly worn out and untrustworthy, like the old *noblesse*. But in all his views of general policy, in all his constitutional doctrines, and in his views of party policy and party duties, no man ever exhibited a more acute or a more calm and reflecting mind — with the single exception of his favourite hobby-horse, the Impeachment — the endless, the groundless, the bootless Impeachment. This for years and years engrossed his mind, and it often really prevented him from exercising the most ordinary portion of common sense and discernment. The Indian tribe, for instance, as he termed them — that is, all who had served their country or made their fortunes in the East — were the objects of his endless hatred and unwearied abuse. One is a “a criminal who should long since have fattened the region kites with his offal.” Another sets on the Chief Justice to commit a foul murder (no regard being had to the trifling circumstance of the three other Judges joining in the sentence). A third is wicked and profligate, even for an East Indian. And the strangest thing of all is, to observe how his hatred of Jacobinism makes him look on

the other objects of his hatred as Jacobins, when they very notoriously are, of all classes, the most averse to everything of the kind; for we find him, after the abuse of liberty in the French Revolution had begun to divide his zeal with the East Indian abuses, speaking continually of the gentlemen from the East as practical Jacobins, and attacking them as public criminals of the same class. The injury inflicted on the Whig party by this extravagance was incalculable. That party never could, by possibility, gain by the result of the Impeachment, whatever success might attend it; for the Minister had made himself the ally of Mr. Burke, and, indeed, had enabled him to carry his motion against the Governor-General, as he defeated him when the question of the Chief Justice arose. So that a mere occasion for the display of eloquence was all the Whigs could hope to gain from the speculation; while they lost by it the chance of opposing the Minister on many other questions of practical importance; and also created the most universal and deep-rooted prejudice against themselves and their whole policy in the minds of every person connected with the East. For it is not to be doubted that never statesman or ruler was more universally esteemed and admired than was Mr. Hastings by all who had ever been in the East, and all who were closely connected with its affairs. The party accordingly soon tired of the Impeachment and of Mr. Burke; and there were some most important members of it, such as the first Lord Lansdowne, who from the beginning took a very decided part against it. That distinguished statesman has left a very fine bust of the great Governor-General, on which are inscribed the significant words, "*Ingrata Patria.*" Sir A. Piggott was no follower of Lansdowne House; but the mischief of Mr. Burke's *monomania* upon Hastings may certainly have made him estimate below their real value the sense and genius of that extraordinary person.

If such and so moderate was my old friend's estimate of Mr. Burke, it is easy to conceive how much lower he held Sir Philip Francis. Him he charged, as did all the party, with having stirred up Burke's unmanageable zeal—and him he also charged with uniformly acting in the whole of a great

national and even a judicial question, from motives of mere personal hatred and revenge; of his talents, he perhaps formed too low an estimate, and of his judgment or discretion (qualities which, in Piggott's view, were of first rate importance) he certainly held the lowest opinion possible. It must not, however, be supposed that he at all differed with the bulk of the party in his opinion of Hastings's conduct, though he must have considered it as exaggerated and prejudiced, and probably regarded the whole affair of the Impeachment as unhappy for the Whig party in every point of view. But he acted as one of the council to the managers; and hence he leant a good deal more against Hastings than he was at all likely to have done but for this connection.

When I now look back on these strange, and, to the country, very discreditable proceedings, I must say that nothing, for a trifling part of it, seems more inconceivable than the cool injustice, as well to the tax-paying people of England, as to the unfortunate victim of the combination against all justice—of giving the managers the aid, at a most heavy expense to the public purse, of no less than six counsel. Not only had they two king's counsel from chancery, Pigott and Mansfield (the latter formerly Solicitor General), and two common lawyers, W. Burke and Douglas, but they must needs have also a pair of doctors, Scott, afterwards Lord Stowell, and Lawrence; and why two civilians in a matter utterly wide from all consistorial subjects? Simply because Burke must take the childish fancy that some questions of the law of nations might arise—a supposition wholly fanciful, and ridiculous, and which was treated with the supreme contempt it so well deserved, by the defendant never once dreaming of having any but common law men for his advocates. Observe too, that among the managers themselves were all the Whig lawyers in the House of Commons. Here then was Mr. Hastings to struggle against the eloquence of Fox, Burke, Sheridan, Wyndham, and the legal subtilty of the lawyers in parliament—and that not being enough, there must be added, at the expense of hundreds a day, six other most eminent practitioners in different courts in order the more effectually to overwhelm his

person and his purse. To meet all this array he had only three counsel, and those not then of the first eminence in point of practice: Law, afterwards Ellenborough, Dallas, and Plomer — the first alone an able and excellent advocate, the second a flowery and rather feeble speaker, little of a lawyer, and eminently unhandy at *Nisi Prius* — the third no lawyer at all, and only good at a long and loud speech, and wholly incapable of *Nisi Prius* practice; so that Law was his only resource.

The Whigs had, moreover, some little regard to the pleasing operation of promoting their connections in this arrangement. Thus Mansfield and Pigott were their sworn allies; W. Burke was the cousin, or brother, of Edmund, and never held any other brief. Douglas, afterwards Lord Glenberrie, always useless as an advocate, and never known in the profession but as a reporter in the king's bench and election committees, was son-in-law of Lord North, the idol of the party ever since their famous coalition with him. Thus of the whole six not one was of the very least value as *Nisi Prius* advocate; and yet the only conceivable use of them was to help the managers on points of evidence as they suddenly arose. For even Pigott and Mansfield had for years been confined to the Court of Chancery, and never been in great practice at *Nisi Prius*; and the other four were not even to be named. I may thus retract what I said of the legal array oppressing the defendant: it was designed to do so, but the love of party jobbery mitigated the blow levelled at him. Little courage did it ask of Law to stand alone against the array thus appearing against him. He saw no one *Nisi Prius* man against him; but Equity men, when no point of equity could arise — Civilians, when there was no point of civil-law involved — and cyphers. But when an impeachment again came on in 1806, it was observed that the vile and jobbing precedent of 1788 was not followed; and Lord Melville's accusers had no aid of counsel at all, though in a case which far more required it.

We old men, retired judges, have the privilege of rambling, of making *extra viams* in our journey, and one topic suggests another. I have named the trial of 1806. There were some

passages therein which may be worth recording. Jekyl was a manager, and he was even more profuse of his little jokes than usual. Conceiving, I suppose, that his dignity of manager did not allow him to jest in his own proper person, he fathered his *dicta* upon others, and especially the Duchess of Gordon, who, from affection for her old friend and ally, Harry Dundas, was a very constant attendant in the peeress's box. Of Plomer's speech (a very powerful though somewhat heated and ponderous performance) he made her observe that it was "Plumber's work — hot and heavy." Of Dan Giles, an old subject of Jekyl's *muse*, and he not being very happy in his efforts as a manager, the good duchess was made to say, "Giles is the manager's daughter — Mis Manager." Jekyl was not the only joker on the occasion of this famous and ill-starred trial. The reverend the Judges partook of the general contempt of the proceedings. Mr. Baron Thomson was pleased to say, "he had often heard of impeachment of waste, but here was waste of impeachment." In one sense it was not wasted, for the admirable firmness, mixed with perfect suavity of the Chancellor (Erskine), restored that constitutional remedy to the position of being practicable, from which Burke's endless proceeding against Hastings had seemed to degrade it for ever. To conclude on this head the little that I have to say, the argument of Pigott on a question of evidence and procedure was by far the ablest thing to which the trial of 1806 gave rise; and Romilly's summing up, though most able in all parts, and in some very beautifully done, fell exceedingly flat from want of physical power in the delivery, and from the ill-judged course of having neither an exordium nor a peroration. Whitbread's display was in all respects unhappy—over done—in bad taste—and failing even in close reasoning on the facts. Its worst part, about his father's death and trade, gave rise to extreme merriment, instead of proving at all pathetic. Mr. Frere turned the son's speech into verse, in which I remember one of the lines, which alluded to the father's:—

"Bier with an *i* and his Beer with an *e*."

I recollect the good old gentleman himself once remembering his beer with an *e*, when he might as well have forgotten it.

Beercroft was in company, and Old Mr. Whitbread would always call him "Mr. Beercraft;" on which the counsellor was pleased to observe sharply: — "I'll tell you what, Mr. Whitbread; that's not my name, but your trade."

ART. II.—THE LAW OF ESTATES.

CHAP. IV.—ESTATES IN DOWER.

IN the last Chapter¹ we mentioned those estates for life which are expressly created by deed, will, or other assurance; we now come to consider that kind of estate for life which derives its existence from the operation of some principle of law. This kind may be divided, according to their importance, into 1. Estates in Dower; 2. Estates by the Curtesy of England; and, 3. Estates after Possibility of Issue extinct. We shall treat of each of them separately; and, *first*, of AN ESTATE IN DOWER.

We have hitherto treated of those estates which may be said to have a permanent place in the law of property in this country. Estates in fee, estates tail, estates for life, as we have already described them, are well adapted to meet the wants and wishes of the community. We do not expect any alteration in the law of primogeniture. It is possible that the law of tenure, as respects these estates, may be somewhat altered; but this will affect very slightly, if at all, the rules which we have laid down respecting them. We now, however, come to a species of estate which has long been in an unsatisfactory state; inefficient for the purposes for which it was designed, the legal liability to which is constantly evaded, and the rules as to which we think it would be well to consider further, for the purpose of making them more conformable to the necessities of the case. It has been said by Sir Joseph Jekyll, that dower "is the only plank the

¹ *Antè*, p. 33. See the preceeding chapters of this Treatise, 4 L. R. pp. 33. and 277. and *antè*, p. 33. Its object is to show chiefly to the student the present

wife can lay hold of to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower."¹ If this be so, it should be placed on some more satisfactory footing.

Even as far back as the time of Lord Coke dower was not in favour; for, alluding to the disadvantage which the widow was placed in being driven to her writ of dower, he says, "The well-advised friends of the wife will provide for a jointure to be made to her²;" and we shall see that, by what has long since become a common form in conveyancing, the liability to this "moral right" has been systematically, and almost as a matter of course, defeated; and, at last, by statute³, the whole character of the estate, and almost all its important rules, have been materially and almost violently altered.

In treating of this estate, we shall pursue nearly the same arrangement that we have hitherto followed as to others, and consider, I. What an estate in dower is? II. How held or enjoyed? III. How aliened and barred?

I. *What it is.* — Dower among the Romans signified the marriage portion which the wife brought to her husband, on which he only acquired right of enjoyment, or *usus-fructus* during the marriage, whether it consisted of lands or moveables, and it reverted to the wife at his death.⁴ But among the Germans, from whom this custom is derived, it was a rule that a woman should bring no fortune in marriage, but should acquire a right to some of her husband's property in case she survived him.⁵ The custom of dower was, it is said, unknown in England until the arrival of the Saxons; for the Welsh were unacquainted with it before the statute of Rutland, nor was it established among the Irish until they adopted the English laws.⁶ Glanville noticed the distinction between the *dos* of the English law, and the *dos* or *dowry* of the Roman law.⁷

state of the law on the subject of which it treats, reference being had to the recent statutory alterations. See this adverted to 4 L. R. p. 38.

¹ 2 P. Wms. 702.

² Co. Litt. 32 b.

³ 3 & 4 W. 4. c. 105. This is one of the acts drawn up by and passed under the auspices of the "Real Property Commissioners."

⁴ See 4 L. R. 101, 102.

⁵ Heinec. Elem. Jur. Germ. ch. 1. s. 5.

⁶ Dav. Rep. 136.

⁷ Glanv. vi. c. lvii, c. l. See also Tacitus De Mor. Germ. c. 18., Spence,

But dower, in the common law of England, is taken for that portion of the lands or tenements which the wife has, for term of her life, of the lands or tenements of her husband after his decease, for the sustenance of herself, and the nurture and education of her children.¹

Littleton mentions five kinds of dower, but it is quite useless for our present purpose to consider any but the first or dower by the common law, of which he says,² "Tenant in dower is where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife and dieth; the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband (for she must be above nine years old at the time of the decease of her husband), otherwise she shall not be endowed."

To the consummation of this estate, three things are necessary, viz. marriage, seisin, and the death of the husband.³

1. *Marriage*. — Although the wife must be nine years of age, the age of the husband is immaterial⁴; "and if a man taketh a wife of the age of seven years, and afterwards alien his land, and after the alienation the wife attains to the age of nine years, and after the husband dieth, the wife shall be endowed; for albeit she was not absolutely endow-

Eq. Jur., vol. 1. 145. 4 L. R. 102. In Glanville's time the common mode of endowing was that *ad ostium ecclesiæ*; but it was limited to the third part of the freehold lands, which the husband held at the time of the marriage. This limitation is likewise mentioned in Braeton and Fleta. Brac. lib. 9. c. 39. s. 2.; Fleta, lib. 5. c. 24. s. 7.; whereas in Magna Charta, c. 7. the law of dower, in its modern and enlarged sense, as applying to all lands of which the husband was seised during the coverture, was clearly defined. 4 Kent. Com. 36.

¹ Co. Litt. 30 b.

² Litt. s. 36.; Co. Litt. 30 b. Two of the old kinds of dower, dower *ad ostium ecclesiæ* and *ex assensu patris*, were abolished by the 3 & 4 W. 4. c. 105. s. 13.

³ Co. Litt. 31 a.

⁴ Id. 33 b.

able at the time of the marriage, yet she was conditionally dowable again, if she attained to the age of nine years before the death of her husband."¹ But this rule must now be understood, subject to the provisions of the Dower Act, which we shall state hereafter.

If a marriage *de facto* be voidable by divorce, in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed *e vinculo matrimonii*, yet if the husband die before any divorce, then for that it cannot now be avoided, this wife *de facto* shall be endowed for this is *legitimum matrimonium quoad dotem*.²

2. *Seisin*.—Before the late Dower Act this seisin must have been either a seisin in law or a seisin in deed. As where lands or tenements descend to the husband before entry, he had but a seisin in law, and yet the wife should be endowed, albeit it were not reduced to an actual possession; for it was not in the power of the wife to bring it to an actual seisin, as the husband might have done his wife's land when he was to be tenant by curtesy³; but now a mere *right of entry* will give a title to dower.⁴

A seisin for an instant is sufficient where it *abides* beneficially in the husband⁵; but where the same act which gives the husband the estate conveys it out of him again, as where he is a mere releasee or grantee to uses⁶, dower will not attach.

The seisin must be of an estate inheritable by the issue begotten between the husband and wife.⁷ If tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife has nothing in the tenements, and the husband has an estate as donee in special tail. Yet if the husband die without issue, the same wife shall be endowed of the same tenements, because the issue

¹ Co. Litt. 33 a.

² Id. ib.

³ Co. Litt. 31 a.

⁴ 3 & 4 W. 4. c. 105. s. 3. But the dower must be sued for or obtained, within the period during which such right of entry or action might be enforced. As to which see 3 & 4 W. 4. c. 27. ss. 2, 3, 24.

⁵ 2 Com. 132. Prest. Est. 546.

⁶ Co. Litt. 31 b.

⁷ Litt. Ss. 52, 53.

which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife die, living her husband, and after the husband takes another wife and die, his second wife shall not be endowed in this case.¹ As to the seisin of the husband, it was not necessary that the same should continue during the coverture, for "albeit," says Lord Coke, "the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c., yet the woman shall be endowed."² But now no widow who shall have married after the 1st of January 1834, shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.³

A woman is not entitled to dower out of an estate in remainder or reversion expectant on an estate of freehold, because the husband has no seisin. But a woman is dowable of a reversion expectant on a term for years, because the husband is seised of the freehold. Thus if a man before his marriage makes a lease for years, reserving rent, his wife will be entitled to a third of the land for her dower, and also to a third of the rent as incident to the reversion. If no rent be reserved on the lease, then, although the widow may recover a third of the reversion, yet the judgment will be with a cessat executio during the term.⁴

Where lands are mortgaged for a term of years only, a woman will be entitled to dower out of the equity of redemption; but if lands are mortgaged in fee before the marriage, the wife will not be entitled to dower, because the husband has not the legal estate.⁵

Although the wife be a hundred years old, or the husband at his death be but four years old, so as she had no possibility to have issue by him, yet dower shall attach.⁶

¹ Litt. s. 53.

² Co. Litt. 32 a.

³ 3 & 4 W. 4. c. 105. s. 4. 14.

⁴ Co. Litt. 32 a. 1 Cru. Dig. 172.

⁵ Cru. Dig. tit. 15. c. 3. ; *sed quare*, see the Dower Act, s. 2. *post*. p. 271. n. 10.

⁶ Co. Litt. 40 a. "For," says Coke, "women in ancient times had children at that age, whereunto no woman doth now attain, and the laws cannot judge that impossible, which by nature was possible. And in my time a woman above threescore years old had a child, and ideo non definitur in jure."

3. *Death of the Husband.*—This is intended of a natural, not a civil death; for if the husband entered in religion, the wife shall not be endowed until he be naturally dead.¹

We have already mentioned the estates of which a woman may be endowed. There are one or two exceptions. Thus a woman shall not be endowed of a castle that is maintained for the necessary defence of the realm, because it ought not to be divided, and the public shall be preferred before the private. But of a castle which is only maintained for the private use and habitation of the owner, a woman shall be endowed.² And of the principal mansion or capital messuage, the wife shall be endowed³; and of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itself, yet a woman shall be endowed thereof in a special or certain manner. As of a mill, a woman shall not be endowed by metes and bounds, nor in common with the heir; but either she may be endowed of the third toll dish, or *de integro molendino per quemlibet mensem*. — A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a fair, of the third part of a piscary, as *tertium piscem vel jactum retis tertium*, and of the third presentation to an advowson.⁴

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve-pence, the heir by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time, for her title is to the quantity of the land; viz. one just third part.⁵

The dower of the wife is not dependent on having issue. She has this advantage over tenant by the curtesy; but she has this disadvantage—that she cannot enter into her dower by the course of law, but is driven to her writ of dower to recover the same.⁵

Although by the common law, the widow is entitled to

¹ Co. Litt. 33 b.

² Ib. 31 b.

³ Ib. 32 a.

⁴ Ib. 32 a.

⁵ Ib.

one third part of the lands of her husband, yet by the custom of some counties, she shall have the half; and by the custom of some towns or boroughs, she shall have the whole¹; and, as custom may enlarge, so it may abridge dower and restrain it to a fourth part.²

Dower may be had of an estate in common, but not of a joint estate.³ The reason of this diversity is, that the joint tenant, who survives, claims the land by survivorship, which is above the title of dower; but tenants in common have several freeholds and inheritances, and their moieties, or other parts, shall descend to their several heirs, and therefore their wives shall be endowed.⁴

Dower so far as copyholds are considered, is entirely dependent on the custom of the manor. It is called free-bench where it exists, and usually consists of one-half of the lands, but sometimes it does not exist at all. It is to be observed that the Dower Act does not apply to free-bench.⁵

A widow being an alien shall not be endowed, except she be the Queen Consort.⁶ If the husband be an alien, the wife shall not be endowed.⁷

According to a note of Mr. Hargrave⁸, there is an act of Parliament not printed among the statutes, 8 H. 5., under which aliens married to Englishmen by licence of the Crown, may demand their dower.

The subject of a British colony where the law of England has become established, will be entitled to dower.⁹

Widows married before the 1st of January 1834, were not dowerable out of equitable estates. But now by stat. 3 & 4 W. 4. c. 105. s. 2., where a husband¹⁰ shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall

¹ Litt. s. 37. ² Co. Litt. 33 b. ³ Litt. Ss. 44, 45. ⁴ Co. Litt. 32 a.

⁵ Doe v. Swinnell, 1 Ad. & El. N. S. 681. ⁶ Co. Litt. 31 b.

⁷ Co. Litt. 31 a. ⁸ Harg. Co. Litt. 31 a. 187.

⁹ Jephson v. Riern, 3 Knapp, 130.

¹⁰ It is doubted by some whether the clause limiting the operation of the act (s. 14.) applies to this section or to any other clause *extending* the rights of widows, but relates only to those which *curtail* them. See 1 Hayes. Convey. 273. ed. 4.

be an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled to dower out of the same land.

There are some cases in which a widow has a right of election, as to the property out of which she is dowable. Thus, if the husband exchanges his lands for others, his widow shall have her election to be endowed, either of the lands given, or of those taken in exchange, because her husband was seised of both during the coverture.¹

The wife of an idiot non compos mentis, outlawed, or attainted of felony or trespass, attainted of heresy, præmunire or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower, she shall not be endowed²; and as to the dower of the wife of an idiot, Blackstone³ says,—"It seems at present agreed upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract."

II.—Let us now see how an estate in dower is held or enjoyed.

Lord Coke speaking of this estate, says:—Dos, the very name, doth impart a freedom⁴, for the law doth give therewith many freedoms:—*Secundum consuetudinem regni mulieres viduæ, &c., debent esse quietæ de tallagiis, &c.*; and tenant in dower shall not be distrained for the debt due to the king by the husband in his lifetime in the lands which she held in dower; and other privileges she hath, of all which Ockham yields the reason:—*Doti ejus parcatur quia præmium pudoris est.*

A woman married before the 1st of January, 1834, shall hold her dower discharged from all judgments, leases, mortgages, or other incumbrances made by her husband after the marriage, because her title being consummate by his death, has relation to the time of the marriage and to the seisin which her husband then had; both of which are prior to such incumbrances.⁵

But now, as we shall hereafter see, a man may dispose of

¹ 1 Cru. Dig. 173.

² Co. Litt. 31 a.; 2 Blac. Com. 131.

³ 2 Com. 130.

⁴ Co. Litt. 31 a.

⁵ 4 Co. 65 a.

his lands in his lifetime by deed, or devise them after his death, free from the claim of dower.¹

Tenants in dower are prohibited from committing any kind of waste. But it has been held that if land assigned for dower contained an open mine of coal or lead, the dowress might work it for her own benefit.² At common law a dowress could not devise corn which she had sown; nor did it go to her personal representatives, but became the property of the reversioner, because the widow, being entitled to an immediate assignment of dower after the death of her husband, if the lands happened to be sown at that time she had the benefit of it, which made her case different from that of other tenants for life, who are seldom put into possession of lands that are sown. It was however provided by the Statute of Merton, 20 Hen. 3. c. 2., that a dowress might dispose, by will, of the growing corn, otherwise that it should go to her executors.³

III. We lastly propose to consider how this estate may be alienated or barred.

A tenant in dower has the same right, and is under the same restraint as to alienation, as any other tenant for life, and dower may be barred by 1. The dissolution of the marriage; 2. The determination of the estate; 3. Satisfaction; 4. By jointure; 5. By the act of the husband under the Dower Act; and 6. By uses to bar dower.

1. It is necessary that the marriage do continue; for if that be dissolved, the dower ceaseth, *ubi nullum matrimonium ibi nulla dos*. But this is to be understood when the husband and wife are divorced *a vinculo matrimonii*, as in case of precontract, consanguinity, affinity, and not *à mensâ et thoro* only, as for adultery⁴; and in the former case the marriage must be dissolved in the lifetime of the husband. If the wife elope from her husband, that is, if the wife leave her husband and goeth away and tarrieth with her adulterer, she shall lose her dower until her husband willingly without ecclesiastical coercion be reconciled to her, and permit her to cohabit with him.⁵

¹ See *post*, p. 276.

² *Houghton v. Leigh*, 1 Taunt. 402.

³ 2 Inst. 80.

⁴ Co. Litt. 32 a. *Prest Est.* 601.

⁵ Co. Litt. 32 a.

2. In the case of an estate tail the dower of the wife continues, though the estate tail be determined. But there are several cases where the dower ceases upon the determination of the estate. 1. Where the fee is evicted by a title paramount, dower necessarily ceases.¹ 2. Where the seisin of the husband is wrongful, and the heir is remitted, by which the wrongful estate is determined, the right to dower ceases. 3. Where the donor enters for breach of a condition, the right to dower is defeated.² 4. Where a person has a qualified or base fee, the right to dower ceases, when the estate is determined.³ 5. Where an estate in fee simple is made determinable upon some particular event, if that event happens, dower ceases with the estate.⁴

3. *Satisfaction.* — A widow may be barred of her dower by accepting any interest in the dowerable estate, which is inconsistent with her title to dower. Thus if the widow accept from the heir a lease for life of the whole of her husband's freehold estate, she will be barred of her dower, as she cannot claim dower without in part defeating the lease.⁵ So if she takes a provision under a settlement or will of her husband, it will always be a question in a Court of Equity whether this does or does not operate in satisfaction of her dower. But these questions are materially lessened in number by the operation of the Dower Act. By that act (s. 9.) when a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. Under this section it has been doubted whether a will made in contemplation of marriage can bar the future wife of her dower.⁶ But by s. 10. no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of out of his

¹ Litt. s. 393.² 1 Cru. Dig. tit. 13. s. 2.³ 10 Rep. 98, a.⁴ Buckworth v. Thirkell, 3 B. & P. 652.⁵ Perk. s. 350.⁶ Marston v. Roe, 8 Ad. & El. 14.

land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

Legacies in satisfaction of dower are still to be entitled to priority over other legacies, according to a well known rule in Equity.¹ This rule does not obtain where the testator leaves no estate.²

4. The widow may also be barred by a jointure, and here we shall adopt Blackstone's statement of the law as to this estate, with some alteration.³ A jointure, which, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke⁴:—"A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. 8. c. 10., commonly called the Statute of Uses. It is here only necessary to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another, whose directions, with regard to the dispositions thereof, the former was in conscience obliged to follow, and might be compelled by a Court of Equity to observe. Now, though a husband had the use of lands in absolute fee simple, yet the wife was not entitled to any dower therein, he not being seised thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife, in case she survived her husband. At length the statute of uses ordained, that such as had the use of lands, should, to all intents and purposes, be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives

¹ S. 12. *Heath v. Dendy*, 1 Russ. 543.

² *Acey v. Simpson*, 5 Beav. 35.

³ 2 Com. 137.

⁴ 1 Inst. 36.

would have become dowerable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided, that upon the husband's making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower.¹ But then these four requisites must be punctually observed: 1. The jointure must be limited to take effect immediately on the death of the husband²; 2. It must be for her own life, or during widowhood at least³, and not *pur auter vie*, or for any term of years, or other smaller estate; 3. It must be made to herself, and no other in trust for her; although a trust estate is a good equitable jointure⁴; 4. It must be made in satisfaction of her whole dower, and not of any particular part of it; and this should properly be expressed in the deed; but if not expressed, it seems that evidence will be let in to prove the fact.⁵ If the jointure be made to her after marriage, she has her election after the husband's death, and may either accept it, or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.

Though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.⁶ Wherefore, and for other reasons, Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow.

5. A fifth mode of barring dower is by the act of the husband, under the act 3 & 4 W. 4. c. 105. Before that act, the husband and wife, by levying a fine, or suffering a recovery, could bar the right of dower in the wife⁷; but by the late act

¹ 4 Rep. 1. 2.

² Mr. J. Coleridge's note.

³ 4 Rep. 3.

⁴ Harg. Co. Litt. 226.

⁵ Co. Litt. 36 b; 4 Rep. 3.; Owen, 33.; Pres. Est. 599.

⁶ Co. Litt. 37.

⁷ Goodrick v. Shotbolt, Prec. Ch. 333; 10 Co. 49.

the power of the husband over the dower of the wife is greatly enlarged; for it is enacted, in the first place (s. 5.), that all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts, and engagements to which his land shall be liable, shall be valid and effectual as against the right of his widow to dower. In the second place, it is enacted (s. 6.), that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, or by his will (s. 7.), it shall be declared that his widow shall not be entitled to dower out of such land. So that by this act the husband, by any deed executed in his lifetime, or even by his will, may deprive his widow of all title to dower; but it is to be borne in mind, that this act only extends to the dower of widows married after the 1st of January, 1834. The title to, or estate in, dower of widows married on or before that time could only be defeated by fine or recovery when those assurances existed; and since their abolition, can be barred by the deed substituted in their room.¹

6. *By Uses to bar Dower.*—The power to the husband given by the Dower Act over his wife's dower would be more important if the right to dower were more extensive; but it has, in fact, been greatly diminished; first by jointures, and, next, by the almost universal practice, which has existed for the last fifty years, of conveying lands, on a purchase, in such a manner that, while the husband has complete power to dispose of the lands, the dower of the purchaser's widow cannot attach, or, as it is generally called, *to uses to bar dower*—an ingenious contrivance which has long been extensively resorted to; the most usual form of which is said to have been suggested by Mr. Fearne, to evade the claim of dower.²

¹ Blackstone, by Stewart, vol. 2. 159. ed. 3.

² See *Duncombe v. Duncombe*, 3 Lev. 437; Fearn. Cont. Rem. 347, seventh edit.; 2 Sand. on Uses, 321. Speaking of their forms, and of the difficulties which have arisen under them, Chancellor Kent says, "In this country (the United States) we are happily not very liable to be perplexed by such abstruse questions and artificial rules, which have encumbered the subject of dower in England to a grievous extent. Even in those states where the right of dower

By means of these uses the lands are conveyed to the husband in such a manner that, although he has full control over them, dower does not attach. It is now usual, since the Dower Act, not only to convey lands to uses to bar dower, but to insert a declaration by the husband, under that act, that dower shall not attach; although this is not done by some practitioners without express instructions. "If the widow was married before the 1st of January, 1834," says a recent commentator, "her husband's declaration under s. 6. will not exclude her from dower even as to lands purchased after that day. If, on the other hand, the marriage was after that day, the usual limitations to bar dower are [to some extent] ineffectual for that purpose (s. 2.). Both forms should, however, be retained in purchase deeds for many years to come in order to prevent the necessity of inquiries at future times whether the owner was married before or after the day in question."¹

ART. III.—LIFE AND WRITINGS OF SAVIGNY.

Essai sur la Vie et les Doctrines de Frederic Charles de Savigny.
Par EDOUARD LABOULAYE. Paris, 1842.

[Concluded from p. 32.]

WE now conclude our account of the life and writings of Savigny.

VII. M. Laboulaye next narrates the occupation of M.

as at common law exists in full force, the easy mode and familiar practice of barring dower by deed supersedes the majority of the ingenious contrivances of English counsel. Rather than have the simplicity and certainty of our jurisprudence destroyed by such mysteries, it would be wiser to make dower depend entirely upon the husband's seisin in his own right, and to his own use of an estate in fee simple, pure and absolute, without any condition, limitation, or qualification whatever annexed." 4 Kent, Com. 51. ed. 5. It is greatly to be regretted that this act has failed for the most part in getting rid of these "mysteries" and "intricacies" in this country, which was, no doubt, one of its objects; as, instead of enabling the practitioner to dispense with a form, it has enabled or obliged him to add another.

¹ Browell's Real Property Statutes, 165.

de Savigny, after he had retired from his polemical disputes and discussions.

“Having laid aside polemics, Savigny occupied himself in putting a finishing hand to a work commenced many years before, that History of the Glossators, of which Weis had formerly given him the idea. But, under the influence of the late discussions, the author had singularly modified the plan of his work, and he himself explains to us how, under the guidance of the new doctrines which he had just founded, his ideas were enlarged.

“If, conformably to the general opinion, we consider the civil law of a nation as the arbitrary result of the legislative will, at the pleasure of which, it may vary, at each instant, to give place to some institution, quite new, the law, it must be owned, is not connected with the history of the nation, and of its constitution, except by a link, very feeble, a whim, an accident. It is in this spirit, with reference to the Roman law, that even to this day, the question has been treated, of its duration, or of its disappearance, during the middle ages. It has always been considered as having a proper existence, as independent of the existence and of the condition of the people whom it ruled. I have already elsewhere expressed an opinion quite the reverse. According to my conviction, the law is necessarily produced by the very condition of the nation. Now this conviction changes completely the mode of viewing our historical problem. The question of the duration of the Roman law necessarily leads us to examine the duration of the people, among whom, and for whom, the law has existed; and we cannot admit the continued existence of the law, without previously ascertaining the continued existence of the Roman nationality, and administration. For, if the Roman nation disappeared, under the ruins of the Western Empire, there was neither any necessity for, nor even the possibility of preserving the Roman legislation. It would have been nearly the same, if the vanquished had entirely lost their personal liberty, or their property; there could be no reason for the existence of a legislation, without an object. And even supposing, that all liberty, and all property, were

not lost, if all political life was annihilated, if the conquered people mingled itself completely with the victorious nation, it would be very difficult to admit the continued duration of the Roman law. For the law is a part of the political life of a nation; it is connected in a thousand points with all the rest of the national organisation, and can with difficulty survive a sudden annihilation of the constitution. Add that the continued existence of the legislature presupposes the continued existence of the judiciary organisation, it not being possible to admit, as existing in kingdoms formed out of the conquest, the administration of the Roman law, without Roman judges and tribunals."

"Setting out from the point of view which I have just indicated, it will then be necessary, in order to give a solid basis to this history of law in general, and more particularly of the civil law, to inquire what was in these new states, the position of the Romans—to examine what was the condition of the conquered, that of their lands, and finally what was the constitution under which they lived. This last inquiry calls in its turn for another; for this constitution is connected with the organisation, which preceded the fall of the Western Empire; but undertaking this last study only for an indirect object, I shall confine it to the track which the plan of my work requires."

At the sight of a sketch so very grand, it is impossible for the reader not to feel involuntarily prepossessed in favour of the legislation, of which he is promised the history. And what is felt, is not merely that interest of curiosity, good for a small number of idolators always ready to prostrate themselves before the first parchment blackened by the dust of ages; it is an interest, grave and profound, which seizes every friend of his country and of humanity, when he evokes the past, to ask from that formidable sphinx the motto of the present, and the secret of the future. This legislation, the inheritance of the wisdom or of the folly of our forefathers, which presses upon ours, as the Past, which it represents, presses with all its weight upon our Present,—whence does it come to us? Whither does it lead us? How shall we modify it? It is the first of these questions that Savigny attempts to resolve;

it is those mysterious sources, that he desires to discover. More late in life, and in the work of his old age, he will essay to answer the last demand, and to ensure to the present its legitimate share of influence.

There is not, I conceive, in history a spectacle more imposing than this long child-birth (*enfantement*) of modern civilisation, at which Savigny makes us assist. The Germans are the masters of what was the Roman world, and they have brought into the conquered country their institutions and their usages; but the conquered race has preserved its laws, and its laws are now for it, the past—native country—notionality. At the moment when the bloody contest ceases, when all life seems to have left the expiring empire, there is then maintained, between the two Societies in presence of each other, a silent, but desperate struggle: it is no longer the men, it is the institutions, which combat and destroy each other, until a civilisation, which is no longer either Roman or barbarian, issues at last from the ruins of the Roman, and from the German world, both mingled together and transformed.

In following the destiny of that Roman race, so feeble in the field of battle, but which, when conquered, again raised itself by the superiority of its genius, and ended by ruling over its conquerors, we experience something of that interest which attaches to modern Greece, disputing with its conquerors, what three centuries of oppression have not been able to deprive it of—its religion, its language, its laws; last and dear treasures of a conquered nation, the only power which the ambition of the master cannot annihilate—the sole hope of better days!

Savigny, however, if I may venture to say so, has only imperfectly filled up this immense picture-frame, and it seems that we recognise in his book, two works of different dates, and in some manner placed one upon the other; on the one side, the literary history, such as Weis had conceived, that is to say, the enumeration of the laws, of the documents, of the commentaries, in which the Roman doctrine is contained; on the other, the history of the institutions, such as Savigny had contemplated, under the guidance

of the theories which he had just established, that is to say, the profound history of the successive transformations of civilisation. This second part of the book was the most fruitful mine which science has ever discovered, but our jurisconsult, we would say, has been afraid to plunge into these mysterious depths; content with opening the first veins, and with showing, at a distance, all the riches of the mine which he had commenced working, he seems to abandon to bolder hands that severe political labour, to return to those literary studies in which he is without a rival.

Hence there was for the reader a secret disappointment; we seek for the history of an Institution,—we find the biography of an unknown Glossator. This defect of the book strikes on its first appearance. Goëthe endeavoured to defend his fellow-countryman by a sprightly saying: “The author is reproached for not having done what he did not wish to do, and for having done what he wished.” This defence was more ingenious than just; when God gives to genius a great idea, man is accountable for it to science: for this treasure, which he has first discovered, is the patrimony of all.

The kind of regret however which “the History of the Roman Law” leaves after its perusal, is the certain mark of the eminent merit of the work. Seeing in what a superior manner Savigny has treated the literary part, how is it possible not to regret that he was contented with lightly touching the questions, so grave, which presented themselves before him at every step? This literary history is a masterpiece of patience and of method. The vast labour it must have required to collect documents of every kind, to read manuscripts, diplomas, books more unknown and more rare than even the manuscripts, is truly incredible; and it is certain, that if M. de Savigny has written, as he said, less for readers than for writers to come, he has produced a masterpiece; for his book is destined for a long time to serve as a basis for all the works which shall have for their object the sources of modern civilisation.

We do not, nevertheless, concur in or approve of the too modest destination, which the author assigns to his work; it

is by addressing itself to readers of every class, and of every condition, that "the History of the Roman Law" has rendered to knowledge the most valuable service; the clearness of the ideas, the elegance of the style, the interest of the subject, have preserved for jurisprudence more than one worshipper, hitherto kept at a distance by the dryness of the forms of the ancient school. And it is not only in the destinies of the Roman law, that M. de Savigny has known how to interest the reader; he does so likewise in the march and in the progress of German Institutions. In this field, which was little familiar to him, he has given proofs of a distinctness of view, of a fineness of perception, which, according to us, place him above Eichhorn, although proclaimed the first Germanist of the age. These studies in the German law are so much the more remarkable, that the Historical school has often and justly been reproached with its predilection for the Roman jurisprudence. But for this predilection, justified by the beauty and grandeur of the Roman monument, it would be unjust to make M. de Savigny responsible; for few Germanists have presented to their national law a more generous offering than his; and for the momentary preference of the Roman law, if any one was blameable, assuredly it was not M. de Savigny, but Gaius."

VIII. M. Laboulaye here gives a short account of the truly singular discovery of the Commentaries of the Roman Classical Jurisconsult, Gaius: —

"It was in 1817, that the discovery of this Roman jurisconsult, lost for twelve centuries, gave to the science an impulse, which it seemed it was not any more to receive, an impulse which may be compared to the great movement which, after the discoveries of the sixteenth century, had revived jurisprudence and formed the glory of the French school. Niebuhr was the first author of this fortunate event. Nominated ambassador to Rome, he did not without regret separate himself from that university, which he had, in a manner, founded; and taking leave of Savigny, as they talked of the literary riches which they supposed to be hid in the Italian libraries, "I promise you," said he to his friend, "that from the first city into which I shall descend, I shall send you

some one of your ancient juriconsults, lost in their rubbish." Some days afterwards, chance rendered this joke a truth: Niebuhr, visiting at Verona the ancient manuscripts which the library of that city contained, one of the first which fell into his hands was a St. Jerome, under the writing of which he found fragments of Roman jurisprudence. He hastened to address to M. de Savigny these precious reliques, believing them to be those of Ulpian; but the practised eye of the Juriconsult recognised without difficulty the style of Gaius, a writer of the third century, whose commentaries Justinian had mutilated, in order to make of them the Institutes. Berlin, thanks to the scientific movement, of which Savigny was the chief, immediately seized upon this discovery. The Academy of Sciences, of which Savigny had been a member from 1811, despatched from Berlin to Verona Professors Becker and Goëschen to decipher the precious palimpsest; M. Bethmann Hollweg joined them. The first edition appeared in 1820. It was quite a revolution. It became necessary to unlearn what the masters had taught, and to resume the science from its first foundations; for the key of the arch of Roman jurisprudence, the civil procedure, was now known for the first time. Nevertheless, and this result seems very remarkable, Savigny had written, till that time, with so perfect a knowledge of the sources, so nice a perception of the Roman genius, that his works sustained no sensible detriment from this discovery: Gaius confirmed the doctrine of "*the law of possession.*"

The unexpected re-appearance of these remains of antiquity which were believed to be for ever lost, such as Gaius, the Republic of Cicero, the fragments of the Theodosian Code, in re-opening the Roman world under a new aspect, impelled in that direction all that Germany accounted talented and inquisitive minds, admirers of fair antiquity. Of this movement, seconded by the researches of Niebuhr, Savigny was the chief; it was he who, as professor, and as an author, animated by his words and his labours the young savans who descended into the quarry. His advice always ready, his rich library always open, his friendship always acquired by those who devoted themselves to this common religion of

the science, made the Professor of Berlin the indefatigable apostle of juridical regeneration.

Savigny, notwithstanding his modesty, found he filled, and was well able to perform, that superior part which always falls to the lot of genius, because genius alone is above the quarrels of party and the miserable jealousies of trade. He was, with reference to the science of law in Germany, what have been in France, in our days, Cuvier for the natural sciences, Silvestre de Sacy for the Oriental studies, Cousin for philosophy. More than one of his young disciples, who has more lately become a professor or distinguished writer, has chosen to acknowledge all that he owed to that obliging disposition of the master, so precious to the man who first enters upon the science; for, amid the uncertainty of his first steps, he has need of a hand to guide him, to support him, and to show him a part of the road. Briner, in the *History of the Novels*; Klenze, in the Prologue to the *Lex Servilia*; Barckow, the editor of the *Roman Law of the Burgundians*; Böcking, in the *Brachylogus*; Hæknell, in the new edition of the *Theodosian Code*; Laspeyres, in his ingenious restitution of the *Book of the Fiefs*, have all publicly declared, that it was to the goodness, to the advice, to the communications, of Savigny that they owed a part of their success; and that influence is visible in the two most remarkable works that have issued from the school of Berlin; two writings which remind us of the great manner of the master—"The History of the Judiciary Institutions of the Lower Empire," by Bethmann Holweg, and "The History of the Government and of the Legislation of Zurich," by Bluntschli.

IX. M. Laboulaye next illustrates the merits of M. de Savigny as an author, judge, and statesman, as well as a professor, and narrates his occupations down to the publication of the first part of his last work, in September, 1839.

"As a writer, Savigny was not less distinguished than as a professor. Without speaking of his "*History of the Roman Law*," of which the publication lasted almost fifteen years—since 1815—there has not passed a year which has not been signalled by some research into a curious point of

antiquity : and such is the genius of this man, that each of his researches always ends in a discovery. The greater part of these dissertations, composed for the Academy of Sciences of Berlin, have been published in the "Historical Journal," of which Savigny has been for twenty-five years the constant editor, at first with Eichhorn, then, when the Germanist accepted a chair at Göttingen, in connection with M. Klenze, the most skilful philologist of the modern jurisconsults, then, finally, after the death of M. Klenze, with M. Rudorff, one of the most ingenious interpreters of Roman legislation.

"Some of these dissertations are little masterpieces ; such are those which have for their object the Right of Latinity, the Jus Italicum, the Law of the Colonies, the Roman Taxes, a question which has just been resumed in Italy, and pushed forward by M. Baudi di Vesme, whose researches, however, have merely developed, without contradicting, the opinions of Savigny. Even when we do not participate in the views of the author, it is impossible not to perceive the extreme skill and art with which these dissertations are written. The question, always unique, is so precisely put, the proofs so naturally adduced, the deduction so powerful and so easy, that it is difficult to resist both the charm of that style, of a clearness quite French, and the force of that close logic which evinces profound study and conviction. To fill up happily the somewhat narrow picture-frame of a dissertation, without overcharging the subject, and without impoverishing it, is a rare talent in France, in Germany a prodigy.

During this period of twenty-five years, which seems to have been entirely consecrated to science (so numerous are the works), Savigny, nevertheless, fulfilled the most multifarious functions. Member of the senate of the university, by that title charged with administrative duties complicated enough ; member of the Superior Tribunal (Spruch Collegium), which, in certain cases, the universities form ; of the Council of State since 1817 ; of the Court of Revision and Cassation since 1819 ; an indefatigable professor, and giving every day two or three hours of lectures ; active associate of all the Academies of Europe ; in correspondence with all

whom Germany, France, Italy, Belgium, reckon distinguished lawyers, M. de Savigny, thanks to the moderation of his life, to the order which presides over all his actions, was able for twenty years, for all these multiplied occupations, without having ceased for an instant to maintain his rank at the head of the science, by his particular labours and works.

In 1825, a nervous malady, from which he had suffered for many years, obliged him to seek, in a milder climate, a remedy for intolerable pains; he passed in Lombardy the winter of 1825, and the following year he visited Rome, Naples, and Florence. Although his health forbade any serious occupation, he nevertheless explored the Italian universities; and from the journal of his travels, I extract the following reflections, which their justness and profoundness will render not uninteresting to the reader:—

“ If we believed the narratives of some travellers, we should be persuaded that the intellectual state of Italy is compromised beyond recovery; but in contemplating that country without prepossession, without prejudice, we shall soon be led to a totally different conclusion. Italy is still, at this day, that nation richly endowed for science, which was in other times at the head of the intellectual movement of Europe; the qualities which gave it the prize of civilisation, are not dead, although they may be slumbering. If from on high, a friendly hand were held out to this beautiful country, Italy would rise again worthy of its glorious past, and would soon resume a rank which it would not yield to any of its rivals.”

Unfortunately in Italy, the Government is very far from seconding the progress of the nation; on the contrary, it seems to consider it to be its mission or vocation to discourage the serious labours which would again awake the national spirit. Accordingly, when he arrived at Bologna, M. de Savigny could not refrain from making the following reflection:—“ It is here that G. Rossi taught only a few years ago, who, by the originality of his genius, and the extent of his knowledge, is certainly the first of the living Italian Jurisconsults. At present he is at Geneva, where

he is held in singular estimation, and where, the first, since Jacques Godefroy, he has known how to awaken a powerful interest for Jurisprudence."

On his return to Berlin, in 1829, M. de Savigny took a more and more active part in the Council of State: his perfect knowledge of ancient and modern legislation, the prudence and wisdom of his intellect, the moderation of his views, the firmness of his counsels, secured to him a legitimate influence; his colleagues, besides, were for the most part either men who maintained the doctrines of the Historical school, or former disciples, among whom, and of the first rank for extent of intellect and of knowledge, figured the Prince Royal, now reigning sovereign. William III. had, in fact, towards 1814, received lessons from M. de Savigny, and those lessons have not made a slight impression on the Prince, if we may judge from the political part of the speech delivered at the time of his accession to the throne.

Thus, by a very rare good fortune, it has been given to M. de Savigny to see his views triumphant, not only in the precincts of the universities, but also in the highest spheres of the political world. And it may be said, without temerity, that at present in Prussia the administration is entirely under the empire of the doctrines of the Historical school. Respect for the rights of the past, the wise and prudent amelioration of the present, this device of the Historical school is also that of the Prussian government; and perhaps this is the secret of its strength and of its ascendancy."

X. M. Laboulaye concludes with an account of the last and most important work of M. de Savigny, of which the publication commenced in September, 1839.

"It might have been expected that, after so splendid a triumph, the scientific career of M. de Savigny was terminated, and that he had no more to do than to repose in his glory; he wanted nothing; neither reputation nor fortune, nor high official situations, nor the admiration and the course of a youth eager to hear the lectures of this indefatigable apostle. Yet it is in the midst of this success that M. de Savigny, far from stopping, has entered with determination upon a new career.

Mingling in the direction of the government (for the council of state in Prussia performs almost the part of our council of state under the empire), M. de Savigny contemplated jurisprudence under a new aspect. For a thinker, especially for a jurisconsult, nothing is of so great importance as the habit of transacting great affairs; and whoever has not engaged in this practice will be always, whatever he may do, an incomplete savant. By taking a share in the legislative discussions, Savigny perceived what was too absolute in his theory, and how under the guidance of the ideas of "*Laissez faire*" and "*Laissez passer*," he had ascribed to the state an influence too secondary, upon the development of the legislation. Doubtless the past is a considerable element in all legislation, and he who wishes to break with it is a fool, who resembles the children of Esop commencing the building at the top; but the direct action of the legislator, like the philosophical action of the writer and of the jurisconsult, is also great; and I would venture to say, that the more civilisation increases, the more ideas advance with rapidity, the more also does this action of the political philosopher, or of the legislator, rival the slow action of custom. In our days, the part of the prætor no longer suits our legislators; it is no longer enough to clear the ways of jurisprudence, to remove the obstacles which embarrass or fetter it, so as to leave it, in some manner, to open a road for itself, we must study to prepare the future direction. The plan of the legislator is no longer behind jurisprudence, as at Rome, but alongside, or even in front. It is with the mature age of nations, as with the mature age of men; reason then takes, in its influence over their mind, the place which example and authority held in infancy. The problem, then, in these days, is to secure a beneficial direction to the superior influence of the state. For this influence can no longer be denied. M. de Savigny has recognised it with a frankness, which has almost cost him the reproach of renouncing his former doctrines; but that reproach would have been very ill founded. There is to be found in M. de Savigny no abjuration whatever of his ancient opinions; but, on the contrary, just the natural

progress and development of these same ideas. To an attentive observer, the new book of M. de Savigny appears in germ, or bud, in his celebrated declaration of principles. "The System of the Roman Law," published in 1840, is merely the realisation of the plan traced in the treatise of 1814.

At the present conjuncture, after having exhausted the labours of erudition, after having gone back to the first roots of the civil institutions, German jurisprudence is evidently called to a vocation more immediately useful. The pure science has terminated its revolution; it is time that, by a new progress, it should realise itself, and take possession of affairs; in other words, the moment is come, when theory and practice ought to be amalgamated and identified. These two phases of one and the same science cannot longer remain separate, without mutilating the science itself; for wherever the separation, or distinction is absolute or complete, and that takes place not in Germany solely, theory becomes an amusement of the mind, a *jeu d'esprit*, and practice a trade.

To reconcile, nay more, to identify practice and theory, such was the new object which the activity of M. de Savigny proposed to itself, and from this immense labour he has not recoiled notwithstanding his age, notwithstanding his numerous occupations. It is to this work, that he has consecrated what remains to him of strength and life. This summary of half a century of labour and of the uninterrupted discharge of professional duties, will be the testament of his genius: it will be, at the same time, the conclusion of the grand debate which, for twenty-five years, has agitated the science in Germany. And, in fact, when the doctrine shall have been disencumbered of the useless idle fancies which overload it, when practice shall have been delivered from the errors introduced by ignorance or routine, when the proper part of each of the elements of which the German legislation is composed, shall have been distinguished and ascertained, when the sources and the mysterious generation of jurisprudence shall have been elucidated, when each doctrine shall be clear, precise, and controversy shall no more extend to, or involve the foundation even of the theory, but shall merely embrace its application to particular cases, what will remain

for the legislator to do, except to fix by his all-powerful will, and to establish as law, the result obtained by the science? But this consecration, or sanction of doctrines, let it be particularly remarked, is just such a code as Thibaut would have agreed to, such as M. de Savigny would not now refuse.

M. de Savigny having commenced his work, "The System of the Roman Law," in the spring of 1835, wrote, without any interval, the first four volumes: the fifth is now published (1842). It is difficult to pronounce upon the plan of the work before considering it as a whole; but the prevailing idea is taken from on high, and shows a progress in the mind of the author.

To reconcile practice and theory, M. de Savigny tells us, it is necessary to emancipate practice from the routine doctrines which embarrass it, at the same time to deliver theory from all the baseless and useless systems which have often perverted the most sound ideas. Brought back to their essential elements, practice and theory must be identified, for their starting point is the same, and the separation is only artificial. But to determine these essential elements, what must be done? To take all the institutions by the root, one by one: from this primitive state to trace them in their successive development, to disencumber them of all the parasitical impediments which fetter them, to observe how they are modified under the influence of new interests, and to determine exactly the practical sphere, in which each of these institutions ought now to move.

The fairest field for such a study is, what is called in Germany, "the Modern Roman Law," that is to say, that common fund or stock of theories and usages borrowed from the Roman laws, and modified by the practice of the tribunals, which has formed for several centuries the principal legislation of Germany,—a legislation which now prevails in the countries which have not a particular code, and which, even in those which have adopted a code, forms in fact the foundation of the legislation; since these codes, like ours, have, for the greatest part, been nothing, but the legal consecration or sanction of the ancient jurisprudence, itself borrowed from the Roman doctrines.

This book, then, is addressed at once to the practical and to the theoretical lawyers of all countries, to the juriconsult, as to the legislator, as to the political philosopher. These doctrines, which every day resound in the tribunals, which are defended by principles, which you believe to be borrowed from "*Written Reason*," and which, perhaps, are nothing but the idle fancy of a juriconsult, if you wish to know what is their genealogy, through what medium they have passed, with what impressions each century has marked them; if you wish to know at what distance you are from the Roman ideas, and how the German mind, practice, or philosophy, have transformed under one and the same name, a doctrine, which is now no longer what it was in its origin, take the work of Savigny, and again travel with him that road, of the journey along which he has saved you the ennui. When you shall have re-ascended the acclivity of ages, you will see, on your return, with what confidence you will advance upon the cleared ground, without the theories of one century or age encroaching upon, or usurping the doctrines of another, without people, under the name of the Roman law, the law of nations, the natural law, coming every day to encumber the road, with maxims pretended to be incontestable, but which cannot be defended, except by the length of an usurped possession; then you will learn no longer to consider the law as any thing absolute, which cannot vary, but as an application of the just and of the useful, which is modified at each epoch, under the influence of wants and opinions; then, also, when people shall talk of touching the code, you will no longer be afraid of those changes, which are dangerous only in unskilful hands, for you will know of what is composed that legal inheritance, received from your forefathers; you will know what part is to be repudiated, and what to be held valid; you will march with confidence, without useless innovation, but also without dreading a reform; for you will be acquainted before hand with the starting point, the road, and the goal, or termination.

How remarkable it is, that after forty years' studies, a noble mind should thereby have arrived, through the natural development of its own thoughts, at that re-establishment of

practice, at that union of the science and of the art ; the sublime point at which the Roman jurisconsults had arrived, who in this respect will be our immortal models. And in proportion as M. de Savigny approaches in his ideas to the Roman lawyers, so it seems that his expressions borrow something of their rigid form. No more researches in antiquities, no more literary citations ; a great sobriety of erudition, thought in all its severity ; it is the work of a man, who writes in the evening of life, and who wishes not to lose the time which remains to him, in merely curious researches. This book which interests all the friends of jurisprudence, will certainly, if it is finished, be the most important work, which the science has produced since Domat and Pothier. We ought all, therefore, to cherish ardent wishes that Heaven may preserve so fair a life, and that it may be vouchsafed to M. de Savigny to bring to a prosperous termination, that enterprise, of which the conception alone would be a title to immortality. Happily every thing leads to the belief, that it will be given to the science to preserve, for a long time still, its most worthy representative. Although sixty-two years of age, M. de Savigny may still promise himself a long career ; for he has preserved all the strength of mind and body of a man of forty years. Years have not bent that lofty stature ; and from age his figure has taken nothing, but the majesty. Nothing can convey an idea of what there is of youth and animation in that noble look ; nothing can express the charm and the freshness of his conversation. His speech, slow at the commencement, becomes gradually animated ; it is not the restless and convulsive eloquence of a rhetorician, it is the speech, the discourse of a man of worth ; it is the eloquence which comes from the soul, and carries into your heart, the profound conviction of the speaker. When M. Savigny returns to his favourite studies, when he shews you the treasures of his library, when he speaks of his dear universities, or of some favourite disciple, when he defends his doctrines, his voice rises and assumes an unusual accent. We see that his life has passed in these peaceful enjoyments, and that no storm has troubled the serenity of that firm and constant soul. Whatever relates to the science, interests him ; and

whatever be the country of a savant, that savant is with him welcome and almost a friend. Before that devotion to the science, have fallen the antipathies, and the hatred, which the wars of the Empire had excited. M. de Savigny now does complete justice to our practical lawyers, and holds them up as models for Germany. A legislator himself; he has studied closely, and in its birth, that Code which is the political masterpiece of the age; and some years ago, when, from an improper disposition to borrow from French laws, it was proposed to introduce into Prussia *la Mort Civile*, Savigny, with the discourse of the first Consul in his hand, prevented the establishment of an institution, which, one day or other, we shall erase from our laws.

No one applauds more than he the efforts made in France, of late years, to reinstate the study of history in jurisprudence; he sees, even in the institution of our codes, a guarantee of success for such researches; for the codes leaving to those studies only an interest purely historical, secure to them in that way a detachment and freedom from the ideas of practice, from which otherwise the most excellent minds scarcely ever disengage themselves, or at most only imperfectly. But especially, how did this excellent man applaud the attempts made in France to raise and elevate the mode of teaching the law, and to bring it nearer to the splendid condition of the German universities! With what interest have we not seen him follow the last reforms of M. Cousin, reforms which have unfortunately remained incomplete, but which made part of a vast whole, and which would have given to France, if not the system of the universities of Germany, at least what France may borrow from her neighbours, as being good and useful, without giving up any thing that is good of her own.

We, who have had the happiness of being acquainted with M. de Savigny, and who have witnessed the treasures of that great mind, we have not been able to avoid feeling a secret astonishment and degree of awe in the presence of that majestic simplicity, of that firm moderation, of that confidence in the science, as in a second religion. From this hall of study (cabinet), to which all the rising generation

come in quest of inspiration or advice, we have come out more strong, more courageous, more devoted to the science; applying to ourselves those words which M. de Savigny says, with too much modesty, of himself, but which suit well the humility of a novice. "Let us labour with courage, should we be forgotten. The work of every man is perishable, as is his life; but the idea, which is transmitted from age to age, and which makes of us all, who labour, with zeal and constancy, a perpetual community, this idea is imperishable, and it is in it, that the most feeble tribute of the most obscure workman, is perpetuated and immortalised."

We cannot close this article without returning to M. Laboulaye our cordial thanks for the information and pleasure which his Essay has afforded us, and will, we trust, afford not a few of our readers.

We subjoin the following extract from the preface which M. de Savigny has prefixed to his latest and greatest work, as farther showing that, while he has been recognised as the founder of what has been denominated the Historical School of law, he by no means maintains the doctrines of that school absolutely, to the exclusion of the doctrines of what has been called the Philosophical School, except in so far as the latter doctrines are founded, not on patient observation of phenomena and correct induction, but on fiction, and, overlooking the actual origin and progress of civil communities and nations, ascribe to legislators, powers which they do not possess. On perusal, too, there will perhaps be found throughout the work itself, as great analytical acuteness and as much scientific method, as distinguish the leading writer of the Philosophical School of law.

With regard to what has been called in Germany the Non-Historical School of law, so far as its doctrines are not borrowed from, or have not the merits of those of the Philosophical School, they do not appear to have a clear and distinct character, or to be of general importance in the cultivation of the science. They seem to be chiefly confined to the total rejection of the Roman law, not merely as an authority, but even as containing equitable principles worthy

of imitation, or as affording useful suggestions; and to the compilation of a code solely from national German laws and usages. This Non-historical school appears to have originated in the highly laudable spirit of national independence so prevalent in Germany about the time of the expulsion of the French invaders. But the disputation and controversy appear to have been kept up, or revived, from the party jealousies of small states and communities, from the selfish desires and attempts of individuals to raise themselves to importance by promoting dissension, and from those pugnacious dispositions and polemical tendencies, degenerating too often into personal invective, from which learned, as well as unlearned, men are unfortunately not exempted. For it seems scarcely practicable, at this day, to distinguish purely German laws and usages, as unaffected by the Roman law, to the influence of which the German people have been for so many ages subjected. And at all events, there can now be but little, if any occasion, generally, for a Non-Historical or Germanic School, since the union of the Philosophical and Historical Schools of Law, now, to all appearance, so happily effected, combines all the principles and views, requisite for the advancement of the juridical science.

“When a science,” says M. de Savigny in his preface, “like that of Law, rests upon the uninterrupted efforts of many ages, the present generation, of which we form a part, finds itself in possession of a rich inheritance. Independently of truths acquired, all the attempts of the scientific mind, well or ill directed, are there for us, to show the route which ought to be followed, or that which ought to be avoided, and permit us, in some sort, thus to add to our own forces, the forces of past ages. To renounce, from presumption or indolence, the advantages of our position, or to content ourselves with throwing a superficial glance at the labours of our predecessors, thus abandoning to chance the portion of influence, which they ought to exercise over our advancement or development, would be to repudiate the most precious inheritance of science, the community of scientific convictions, and that living continuity of progress, without which the community of convictions might de-

generate into a dead letter. It is also to be desired, that at distant intervals, from time to time, the attempts or experiments, and the isolated results of the science, should be concentrated under one single point of view.

“ If the wisdom of ages has laboured for us to enrich the science, the possession even of these treasures exposes us to great dangers. In the mass of ideas, of rules, and of technical expressions, which our predecessors transmit to us, a considerable stock of errors, mingled necessarily with acquired truths, supported by the traditional authority of an ancient possession, may easily usurp an unjust authority. Thus it is to be desired that, at intervals, this mass of ideas should be subjected to a new examination, their truth called in question, and their origin inquired into. With this view, we should suppose ourselves in the presence of an individual, who is ignorant of the traditions of the science, or suspects, or disavows, their legitimacy. Freedom of mind, independence of all authority, are the dispositions the most favourable for this critical examination ; but, that independence may not degenerate into presumption, we ought to measure well, and ascertain our own weakness, and derive from the consciousness of that sentiment, the salutary humility, which alone can render the spirit of independence fruitful, or productive of good.

“ Thus, these two opposite points of view bring us back to the recognition of one and the same want for the science, — the periodical revision of the labours of our predecessors, the criticism of the errors, the confirmation of the truths, and an assumption of new possession, which, according to the measure of our strength, may make us advance a step towards the definitive end. To subject the present epoch to the application of these proceedings, such is the object of my work.

“ But, perhaps, the events which have passed in our days, within the domain of the science, will raise against my undertaking a prepossession, of which I should first speak. From the name alone of the author, many will be tempted to call in question, and doubt the generality of the object assigned to the work ; they will believe it to be undertaken

less in the pure interest of the science, than with the exclusive views of the historical school, and dictated by a spirit of party, against which, whoever does not belong to that school, ought to be put on his guard.

“The combined action of many different faculties is indispensable for the success of the science. To designate one of these faculties, and the scientific direction to which it principally answers, the word ‘Historical School,’ was employed by myself and by others, without any after-thought. In calling attention to one of the phases of the science, we wished not to deny or to depreciate any of them; but the historical element having especially been neglected, required to be reinstated and re-established in its rights. With this name of Historical School, is connected a long and animated polemical dispute, which, even in these later times, has not been conducted without asperity. Here the nature of the attacks renders the defence useless, and, in some measure, impossible: for the debate, displaying rather personal repugnances, than science, the adversaries of the historical school have comprehended, and condemned, under that name, every literary production which roused their sensibility, or was contrary to their tastes. What justification can be opposed to such a system of criticism? There is, nevertheless, a reproach, which, on account of its generality, merits refutation. It has been pretended that the partisans of the historical school, mistaking the spirit of their age, wished to subject it to the past, and especially to found the tyranny of the Roman law, to the detriment of the German law, and of the new institutions, which theory and practice have substituted for the Roman institutions. This reproach has a scientific character; and I cannot pass it over in silence.

“To pretend, as has often been done, that the science, contemplated under the historical point of view, propounds the ancient form of the law as an absolute and immutable type or model, for the present and the future, is entirely to misrepresent that point of view. Considered in its true light, it teaches us, on the contrary, to recognize the merit and the independence of each age; it seeks especially to place in a clear light the living link which connects the present with the

past; for, if this link escape us, we may indeed seize the exterior manifestations of the law, but cannot penetrate its spirit. In its particular application to the Roman law, this doctrine does not attribute to it, as is often imagined, an authority without limits; but it studies the whole of the modern law, from a dread that we may be governed by it, without being aware of it; it then decomposes the Roman element, and if any of these parts, dead in reality, preserve merely the appearance of life, it eliminates this superfetation, in order to open a field more free, for the development and the more salutary action of the living element. The present work, far from exaggerating the authority of the Roman law, will reject the application of it to many matters — an application hitherto generally admitted, even by the adversaries of the historical school. And the author has nothing to retract; for these principles are those which he has publicly professed for forty years; an evident proof that the reproach addressed to the historical school is destitute of foundation, especially in what regards him.

“These considerations, perhaps, will determine unprejudiced minds to put an end to these quarrels of parties, and, by degrees, to abandon the names which designate them. Besides, the motives which caused the words *Historical School* to be used, now no longer exist; and the object which was proposed, seems to have been nearly attained. No doubt, a polemical dispute of this kind, bringing certain principles fully into view, delineates them more precisely; but this advantage would be purchased at too dear a price, if it prevented us from appreciating with impartiality the labour of our contemporaries, and if it consumed in party quarrels, the force of mental talent, which would be better employed in promoting the common object and end of the science.”

ART. IV.—THE NEW PILGRIM'S PROGRESS.**CHAPTER I.**

As I walked through the wilderness of this world, I lighted on a certain place where was a den, and I laid me down in that place to sleep, and as I slept I dreamed a dream. I dreamed, and behold I saw a man about to set off on a journey; his staff was in his hand, his shoes on his feet, and he was well girt about the loins; his look was eager, but steadfast. He turned once or twice to his wife and children, who hung about him; he paused for an instant and departed. Now I saw in my dream that, after walking for some time along the road, he came to a place where several ways meet, and there, for the benefit of travellers, a guide-post had been planted. Many of these roads appeared to lead to the same place, but that which seemed the shortest did not always turn out to be so. Most of the roads had their difficulties, and were almost all more or less dangerous to travellers. He whom I saw set out in his journey, whose name was PILGRIM, did not much regard this, but boldly struck into one of the roads, and when fairly in it he mended his pace, and at first got on easily enough.

I have said that many of the roads professed to lead to the same place. This was the CITY OF JUSTICE. But some of the roads went beyond this city, some came short of it, and others, after a multitude of windings and turnings, led to quite a different place. There were other towns and cities pointed out by the direction-post, and of these I shall hereafter have to speak. But the road which Pilgrim took to the City of Justice was called the ROAD OF REFORM.

As it was, Pilgrim, I saw, proceeded along the road that he chose, and, from walking quickly, he took to running; but had not proceeded far before he fell, and he soon found that what he had supposed a very easy and even pleasant road, was one exceedingly difficult, and, although smooth at first,

was filled by nature with pit-falls, quags, and mountains, traversed by deep and rapid streams, and liable to be overflowed by torrents. He soon recovered himself, however, and stepping on more cautiously, a sudden turn brought him to an ascent so steep that it was nearly insurmountable. This was a mountain well known in those parts by the name of **PREJUDICE HILL**. This was exceedingly difficult to get over, and hardly had Pilgrim put his foot on it than up started one **IGNORANCE** to dispute his passage. This was a huge misshapen monster, but only requiring steady opposition to vanquish him. Pilgrim, not frightened at his appearance, began to wrestle with the creature, for he had no weapon but his staff, and, when he had thrown him down, he was for killing him by beating out his brains. This, however, he found impossible. He left him, therefore, and pursued his journey. On looking back he found the creature had recovered himself, and was standing just where he did, ready, so far as he could, to prevent and scare all pilgrims from getting over Prejudice Hill.

But Pilgrim had soon a more dangerous and difficult opponent to encounter. This was **KING PRECEDENT**, a grisly giant who dwelt in that country. He was a man, in many points, to be both respected and followed, but he was for making all the world submit to him, and wished to have a universal dominion. He was, in fact, too fond of his own way, and had put his collar on innumerable persons for ages, which, however it might gall them, he would never remove. Now this collar sometimes fitted the man exactly, and then it did very well, but at other times it was too small, and sometimes too large; occasionally it quite choked the wearer, and sometimes hung loose about his neck. The great enemy of Precedent was **TIME**, a good hermit, who lived in those parts, to whom pilgrims went to be cured of the ills which the collars of Precedent brought about. Sometimes these became quite rusty, and then Time easily removed them, nay, they sometimes dropped off of themselves; but in other cases poor pilgrims were found gasping for breath in their collars, and it was all that Time could do to recover them; nay, they often died before he could come at the proper remedies. Still

many were cured. King Precedent, however, had numerous followers, and some born slaves, who would not do any thing that he did not bid them, and were frightened to death if he only as much as frowned on them. Now Pilgrim had, in fact, one of King Precedent's collars on, but it had been a good deal worn on one side. It did not press him much, and he did not consider himself one of Precedent's slavish adherents, although he was always willing to read his laws and hear his sayings. He would therefore willingly have passed along without affronting or quarrelling with him.

But this, King Precedent would not suffer, and hardly had he proceeded a few yards, when the giant calls after him thus:—"Hollo! Pilgrim, whither would you go?"

Pilgrim.—"I seek, Sir, to get over this mountain."

King Precedent.—"Come hither until I see you! Are not you one of my subjects?"

Pilgrim.—"No, Sir; if it please you, my king is in alliance with you, but I am not your born thrall."

King Precedent.—"Have you not my collar on?"

Pilgrim.—"Yes, Sir; but I owe you no implicit allegiance. My collar is already much worn, and I may throw it off altogether one of these days."

"Nay," said King Precedent, "but I will rivet it closer on you," and therewith he stretched out his hand to draw Pilgrim nearer; but he slipt aside, for Precedent was old and not nimble of foot, and Pilgrim made his way up the mountain in spite of him. Thereupon the king began to wind his horn, and ordered his troops to pursue and bring Pilgrim to him, and on looking back he was indeed affrighted at the numbers of the king's army. But he found they moved in a very confused and disorderly manner, frequently tripping each other up, and even fighting the one with the other. Some were good men, but many were exceedingly weak, and it was sometimes difficult to distinguish the one from the other, so that having the start of them, Pilgrim got fairly clear of all and went on his way, paying due tribute, however, to the king, at a gate where it was demanded.

Having thus overcome Ignorance and got clear of Precedent, he soon reached the top of the mountain, and passing

over it, he prepared to descend on the other side, which was comparatively an easy matter. But he had not proceeded far when he heard loud shoutings and callings, although he could not see from whence they proceeded. Some voices bid him come back, others to beware how he went on. Some called him Enthusiast, others Madman, others Fool, others Knave. In fact, there was no end of names and abuse; but Pilgrim boldly kept on his way, and he soon ceased to be disturbed by those voices and sounds which proceeded from no substantial forms.

And now I saw in my dream that Pilgrim came to the bottom of the mountain and entered on a verdant plain which was spread at its feet, and I saw that he was approached by three men of majestic presence. They wore the robes of judges, and two of them carried the great seal of truth. The brightness of one of these last was not so great as that of his brethren, but there was something unspeakably intelligent in his countenance. They hailed Pilgrim with joy, they solaced him with food, and, leading him to a river cool and clear, they bade him bathe and refresh himself therein. Anon they conducted him to their abode, where he rested that night, and on the morrow they prepared him for the journey.

"And now, good youth," said one, "your journey has begun; we have all trodden this road in our time: you will have many dangers and snares, and combats to encounter, but with the weapons and talismans that we shall give you, you will, if properly used, overcome all enemies." He was then clad anew by them, and armed for every peril. One of them, having the great seal, presented him with the sword of true valour, and the helmet of patriotism. A second, clad in red robes, took a ring from his own finger, and gave it him, in which were three jewels of inestimable price,—learning, integrity, and piety, telling him that if he kept them bright he had nothing to fear. The third, (he whose brightness was somewhat dimmed, but who also wore a great seal at his girdle,) after giving him a drink from his own cup, which created in Pilgrim an insatiable thirst of knowledge, added that which he told our traveller he would find the most

valuable gift of all, the robe of humility. They then bade him farewell, and I saw that he proceeded on his journey.

He had not gone far when he overtook one of a goodly appearance, who appeared to be journeying on the same road. When this one looking behind, saw Pilgrim, he waited, and thus they entered into conversation.

"Well, friend," said the stranger, "whither journeyest thou?"

"I go," said Pilgrim, "to find the City of Justice."

"I am bound thither myself," rejoined the other; "I will gladly show you the way. I am an old traveller, and know well the road."

"Tell me," said Pilgrim, "are you not a subject of King Precedent?"

"That I am," said the other; "nay, I am related to his majesty, and have a great veneration for him. I wear his collar, and, as you may see, it fits me close. But still I like reform too, when it is not carried to excess."

"What may your name be?"

"They call me Mr. FORMAL, and I live in Narrow Row. My mother was a Miss Prating, and was of an old family. I am also first cousin to my Lord Expediency, and I hope to arrive at the City of Justice. How do you propose to get there?"

Pilgrim.—"By asking my way. I inquire the reason of all I see."

Formal.—"Nay, take care as to that. That inquiry gets many into harm. I don't like too much inquiry."

Pilgrim.—"But how else can I learn the truth?"

Formal.—"The truth is not always agreeable or well to be known. You should confine your inquiries within certain bounds, or you will get into a scrape one of these days."

Pilgrim.—"But how can I do this, friend Formal? I have no means of arriving at my object but by asking and inquiring as I go along, for there is no certain map or chart of this land."

Formal.—"Yes, but proceed cautiously. Do not ask too many questions; I object to that."

Pilgrim.—"But why not? and who shall say which are points not to be asked about? Has not every thing been discovered by inquiry and investigation?"

Formal.—"Justice must not be inquired after too strictly. We must rely on chance and other expedients for finding our way."

Pilgrim.—"Nay, then, I must differ from you, friend Formal. I came into this road expressly to inquire after Justice. But how came you here, Sir? Did you get over Prejudice Hill?"

Formal.—"No, dear friend. I found it impossible to get quite over it: there was one Ignorance which prevented me. Nor was it quite consistent with my duty to King Precedent, whom I saw at a distance. But I found a bye-path round the foot of that hill, and a man called SELF-DECEPTION gave me a light, and so I found my way here."

Pilgrim.—"I would advise you to go back; until you get over that mountain, you can never come fairly into this road."

Formal.—"Well, I will think of this; but tell me first, in following this road, shall you go on by jumps, or step by step?"

Pilgrim.—"I purpose going on step by step."

Formal.—"Ah! I like not that; I am for one great move, if nothing is risked by it, and then have done with it."

Pilgrim.—"Why, I like a great move, too, when it can be made safely. If I but see my way clearly, you shall not quarrel with me for doing or even attempting too much."

Formal.—"Nay, but be cautious, dear Pilgrim; if you fail in your details, you will have all your work to do over again. I object to sweeping schemes."

Pilgrim (stopping).—"I fear you have mistaken the road, good Sir. If you like not going step by step on it, and will hazard nothing when a great move is to be made, you must seek some other companion."

While they were thus speaking they came to a part of the road at which another way turned off. Pilgrim was for keeping straight forward, but Formal proposed to take the other road. He showed Pilgrim that a little way down it

the leaves of the trees were made of gold, and many goodly honours were to be had by those who entered it. "Do you not like these things?" said Formal.

"I do," said Pilgrim, "but I will not leave this road to seek after them, if possibly I get them at all."

So they parted company. Formal turned down this road, and Pilgrim went forward on the road he had chosen.

ART. V.—LIVES OF THE CHANCELLORS.

The Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the earliest Times till the Reign of King George IV. By JOHN LORD CAMPBELL, A.M., F.R.S.E. Second Series. Vols. IV. and V. London, 1846.

LORD CAMPBELL has now presented to the public two more volumes of his "*Lives of the Chancellors*," which give the history of the Great Seal, and those to whom it was entrusted, from the Revolution to the death of Lord Chancellor Thurlow. We have already had occasion, in noticing the first three volumes of this work¹, to describe its nature, and to give our general opinion of its merits; and the present volumes do not induce us to change it; although his lordship has, on this occasion, to be tried by a test which has often proved a very difficult one to an author — his previously acquired reputation. As Lord Campbell approaches his own times, his materials for each life become usually more ample, and it was to be expected that the individual lives should occupy more space. The author has, also, had placed at his disposal some private memoirs and letters in the possession of the descendants or relatives of the eminent persons whose lives he narrates; and of these papers he has fully availed himself. They are none of them of great interest or importance.

They do not alter materially our opinion as to the history of the times or the character of individuals, but they often give a freshness to a twice-told tale; and some of them are looked at with the curiosity which is always attached to glimpses into the private life and secret motives of the great and noble. As a general rule, however, the private journals even of Lord Chancellors and Lord Keepers turn out to be but dull affairs. They seem merely to be kept as memoranda to be useful to the writer; not from what is there set down, but perhaps as reminding him of what is not set down. The art of narrating daily occurrences in an interesting manner is a talent possessed by few. Sir Samuel Romilly had it, as we know by the journal which is published in his *Memoirs*; and we should say that Lord Campbell has it himself in an eminent degree. We know not whether his lordship has kept such a journal; but if he is disposed to increase his benefits to the public in the way of authorship, we would humbly advise him to leave the Irish Chancellors to rest in their graves (which we have heard it said he has had some thoughts of disturbing), to take a bolder flight—to do what he repeatedly wishes¹ other Chancellors had done—and give us “*Memoirs of his own Times.*”

The fourth volume (the first of the Second Series) is devoted to the lives of Lord Commissioner Maynard, Lord Commissioner Trevor, Lord Chancellor Somers, Lord Keeper Wright, Lord Chancellor Cowper, Lord Chancellor Harcourt, Lord Chancellor Macclesfield, Lord Chancellor King, and Lord Chancellor Talbot: while in the fifth we find Lord Chancellor Hardwicke, Lord Chancellor Northington, Lord Chancellor Camden, Lord Chancellor Charles Yorke,

¹ Of Lord Somers, he says, “He has left no memoir of himself,” vol. iv. p. 62.; and speaking of Lord Cowper, he says, “from a kindly feeling for him, I could wish he had been more given to philosophy, and that, after the example of several of his illustrious contemporaries, he had mingled the *belles lettres* with politics. What an interesting and instructive work he might have left us, ranking him with the most illustrious of his order—if, on his retirement from office, he had sat down and written the ‘History of his own Times,’ an undertaking for which he has shown, by several of his compositions, particularly by his ‘*Impartial State of Parties,*’ presented to Geo. I., that he was singularly well qualified.” Vol. iv. p. 407.

and Lord Chancellor Thurlow. In giving us an account of all of them, there is necessarily much sameness. Their progress at school, at college, at the Inns of Court, is almost necessarily the same. Lord Campbell has done his best to diversify it. He has discovered, with a laudable anxiety to give interest to his heroes, that "a beautiful roost cock flew upon his [Somers] curly head, and while perched there crowed three times very loudly" (vol. iv. p. 65.); that Commissioner Trevor was, even in early youth, called "Squinting Jack" (vol. iv. p. 42.); that Thurlow, instead of copying precedents, was employed with Cowper in "giggling and making others giggle" (vol. v. p. 485.). But the incidents in a lawyer's life are necessarily few and dull, especially at the commencement of his career, before he is mixed up with the great historical events of his time; and we defy any one to vary them much, having a due regard to truth. It is only fair to say, that the noble author throws himself with great vigour into the early life of all his heroes; and if perused separately, and at some distance of time from each other, the reader can individualise the incidents. But if read continuously, it is not easy to do this. We forget, for the moment, whose life we are reading.

If we are to give an opinion as to which of the lives in these volumes we like best, we must at once pronounce in favour of that Chancellor who, perhaps, least deserved his office, Lord Thurlow. Without much novelty it is a spirited and amusing performance; and next to it we think comes the Memoir of Lord Macclesfield. We now speak of their readable qualities, for the life of Lord Somers is not only the most carefully written, but supplies a great want in our literature.

Having thus sketched the nature of the work, we shall prefer glancing at some isolated portions of its contents to going through them chapter by chapter. The great charm of the work is, that both in text and notes, Lord Campbell relieves the dryness of his subject by giving us freely observations on things in general, sometimes in passages of his own official life, and sometimes by contrasting the occurrences of the past with those of the present times. We cannot always

give his lordship credit for the best taste or the most scrupulous exercise of his power of selecting jokes, professional or otherwise; but he is almost always amusing; and in talking freely as to his own doings and of his contemporaries, he is very rarely ill-natured, either to himself or others. He is certainly bent on amusing his readers, and to accomplish this object he does not spare some self sacrifice; he will,

“ To make them mirth, use all his might, and wreath
His lithe proboscis;——.”

This, for what we know, may be undignified, but without some such relief we are persuaded that the work would have been found beautifully bound on a top shelf of the library, instead of lying, as it now does, worn and dog's-eared on the table.

There is another point in which this work may be viewed with great favour. It can properly be placed in the student's hand, whether of history or law. It contains no distorted descriptions either of persons or of facts. Without any pretension to research, there is displayed throughout a desire to arrive at the truth, and a discriminating spirit in dealing with the evidence before the author. The reader has the benefit of a mind of great power and experience constantly at work in his service, to guard him from erroneous impressions. Praise is fully bestowed where it is deserved, but censure is dealt out with the same equal hand. There may be a slight leaning in favour generally of Chancellors, and there is a somewhat suspicious love of praising some contemporaries. But on the whole we think this work peculiarly valuable for its just estimate of men and things.

There is one other point to which we wish to allude. We have seen somewhere a charge brought against Lord Campbell with reference to the first series of the work, that he has made use of the materials which others have collected without due acknowledgment. This is a charge easily made and exceedingly difficult to disprove.¹ There is no real foun-

¹ We may give as an instance of this, a mistake which occurred to ourselves. In vol. iv. pp. 663—665. in the notes to the “Life of Lord Talbot,” an account is given of her Majesty's visit to Lincoln's Inn, which is taken almost verbatim from the account of that interesting event, given in this Review—

dation for it. We could wish, as we have already said¹, that Lord Campbell had given more frequently his authorities; but that he made this omission from any spirit of unfairness or want of candour, we do not believe.

We now propose to give some extracts from this elaborate work, and we may say with perfect truth, that we have had much difficulty in making selections where there is so much to amuse and instruct.

The charge as to Commissioner Trevor's bribery is thus told:—

“ Trevor might have acquired a complete ascendancy over Anne, and have become her Lord Chancellor and chief adviser, but a blow was now impending over him, which for ever marred his fortunes. In the beginning of 1695, the cry against bribery was violent, and the belief gained ground that the Court, the camp, the city, nay parliament itself was tainted, and that universal corruption prevailed. A motion was made in the House of Commons which must have caused general alarm, but which no one had courage to oppose—for the appointment of a Committee ‘to inquire into the charges which were made against members, with power to send for persons, papers, and records.’ On the 7th of March the Committee reported, “that there having been in the preceding session a bill pending in the House of Commons, promoted by the City of London, called ‘the Orphans’ Bill,’ whereby a power was to be given to lay assessments on the public for the benefit of the corporation, an entry had been found in the books of the Common Council,—‘That Mr. Chamberlain do pay to the Honourable Sir John Trevor, Knight, Speaker of the House of Commons, the sum of 1000 guineas, so soon as the said bill be passed into an Act of Parliament,—that a hint had been given to the Common Council that unless this sum were paid, the bill would not pass,—that Mr. Speaker knew of the order being made while the bill was pending—that when the bill passed, two aldermen and the chamberlain waited on Mr. Speaker, with a compliment of thanks in the name of the City, for his kindness in furthering the

3 L. R. p. 334., not noticing the source, however, but calling it “The official Record of Queen Victoria’s Visit,” &c. On making inquiry in the proper quarter, we found that it was not Lord Campbell who had honoured us by this transfer, but the Benchers of Lincoln’s Inn, from whose official Book it has been faithfully transcribed.

¹ 4 L. R. p. 3.

bill, and an order for the said guineas, which Mr. Speaker accepted,—that two or three days after, Mr. Speaker sent a messenger into the City with the said order, and received the said guineas,—and that the said order was forthcoming with this indorsement thereon:—‘The within-mentioned 1000 guineas were delivered and paid unto the Honourable Sir John Trevor, this 22d of June, 1694, in the presence of Sir Robert Clayton and Sir James Houblon, which, at 22s. exchange, comes to 1100*l*.’

“Corruption being thus traced to the Chair, with a reasonable suspicion that it had communicated the taint to many members by the way, it was impossible for the House to retain any degree of credit with the people unless they declared their abhorrence of the guilt they had discovered, however much they might regret the exposure or pity the victim. Accordingly a resolution was moved, and seems to have passed without much discussion,—‘That Sir John Trevor, Speaker of this House, receiving a gratuity of 1000 guineas from the City of London after the passing of the Orphans’ Bill, is guilty of a high crime and misdemeanor.’ The Speaker was subjected to the unparalleled humiliation of putting the resolution from the chair,—of declaring that the ‘ayes’ had it, and of adding, that it was carried *nemine dissentiente*.”¹

* * * * *

“Strange to say, not only no further proceedings were taken against him to punish him for the bribery of which he had been guilty, or to make him refund the bribe, but he was permitted to retain his high judicial office of Master of the Rolls, taking precedence of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, and to administer justice in

¹ “Trevor’s Life of William III. ii. 250.; Com. Jour. 1694-95; 5 Parl. Hist. 906. ‘On receiving and debating this report, therefore, the Speaker himself, in virtue of his office, was exposed to all the shame and confusion of face which a man could bear, and live, in putting the following question, viz. &c.: And so much grace did he discover upon the occasion, that he chose to abdicate rather than be deposed.’—*Ralph*, ii. 547. ‘He was forced or yielded to put the question upon himself, “As many as are of opinion that Sir John Trevor is guilty,” &c.; and in declaring the sense of the House, declared himself guilty. The House rose, and he went his way and came there no more.’—*North’s Life of Guilford*, ii. 28, 29. A curious difficulty might have arisen if, continuing Speaker, a motion had been made for his expulsion; for the instant the motion was carried, he ceased to be Speaker or a member, although perhaps the resolution would not have had full operation till announced from the Chair. Then he must have been turned out of the House, or taken into custody as ‘a stranger.’”

the Court of Chancery after his expulsion from the House of Commons, for the long period of 22 years, under Lord Chancellor Somers, Lord Keeper Wright, Lord Chancellor Cowper, Lord Chancellor Harcourt, and Lord Chancellor Cowper again.¹ His offence could not have been regarded by his contemporaries by any means in the same serious light in which we should regard it. Even in the resolution of the House of Commons, the bribe is tenderly designated 'a gratuity,' and, in those times, although judicial corruption would have been strongly reprobated, yet to give or to receive money for voting in parliament, was only called 'the way of the world.' The sin was reckoned to be in the discovery,—not in the act."² (vol. iv. pp. 54—58.)

We shall next give an account of a much more pleasing occurrence, and of a truly honourable man,—the abolition of "New Year's gifts" by Lord Chancellor Cowper:—

"One most beneficial change he effected by his own authority, and from his own sense of what was right. Hitherto, according to ancient custom, large 'New Year's gifts' were annually made by all the officers of the Court of Chancery to the Lord Chancellor or Lord Keeper. The consequence was that, for their reimbursement, they were allowed to extort large fees from the suitors; constant reluctance was felt to visit their delinquencies with suitable punishment, and the judge was crippled in the discharge of

¹ "Whether the members thought that the being so basted in the Chair, was punishment enough, or for his taking such gross correction so patiently and so conformably, or else, a matter once out of the way, was thought of no more, it is certain that he never was molested further about that matter, but continued in his post of Master of the Rolls, equitable judge of the subjects' interests and estates, to the great encouragement of prudent bribery for ever after."—*North's Life of Guilford*, ii. 29.

² "Corrumpere et corrumpi seculum vocatur.' Roger North thus alludes over a bribe taken by Sir Edward Turner, another Speaker, in the reign of Charles II.: 'This gentleman had served long as Speaker of the Parliament, and had been useful to the Crown and also to himself. But on the discovery of a small present made to him by the East India Company, he was blown in the House of Commons. The anti-court party took all advantages against the Court, and made a mountain of this mouse; for it was but a trifle. However, it cost him much of his credit and authority in the Chair which he used to have; and he thought fit to give way, and not to sit there longer, to be exposed to the affronts which would continually be thrown at him.' However, he was made Solicitor General, and afterwards Lord Chief Baron of the Exchequer.—*Life of Guilford*, i. 97."

his most important duties. This usage was common to all the Courts in Westminster Hall. But there was another of a more monstrous nature — and still more pernicious, which was peculiar to Chancery — that all the Counsel who practised in the Court came to breakfast with the Chancellor on the 1st of January in every year, and in the hope of being raised to the bench, or of obtaining silk gowns, or of winning ‘the Judge’s ear,’ made him a pecuniary present according to their generosity or their means, or their opinion of his venality or stability.¹ Lord Keeper Cowper resolved entirely to abolish all these ‘new year’s gifts.’”

“He first, out of delicacy, mentioned the subject to Godolphin the prime minister, knowing that he was likely to be privately censured, although no one could openly oppose him. In his Diary, under date 30th December, he says, ‘I acquainted the Lord Treasurer with my design to refuse new year’s gifts — if he had no objection against it, as spoiling, in some measure, a place of which he had the conferring. He answered, *it was not expected of me, but that I might do as my predecessors had done; but if I refused, he thought nobody could blame me for it.*”

“Accordingly the Lord Keeper gave notice that no new year’s gifts would be received by him. Nevertheless, on the morning of the 1st of January, several came to his house with the usual offerings, but they were all denied admittance; and with self-gratulation, though not without apprehension of consequences, he immediately wrote in his Diary, ‘New Year’s Gifts turned back; and pray God it doth me more credit and good than hurt, by making secret enemies in *facie Romuli!*’ The storm that he dreaded arose. No sooner was the fact known that the holder of the Great Seal had refused all new year’s gifts, than the chiefs of the King’s Bench, Common Pleas, and Exchequer, were thrown into a state of consternation; and alarm was felt by the Heads of the Treasury, and other departments of the government, who derived considerable advantage from the present-giving custom. To mitigate the ill-will which he had incurred with those who might have done him a mischief while he ~~was not~~ yet warm in his seat, he resorted to what he considered the justifiable artifice of pretending that it was only by mistake that he had refused the presents of the officers of his Court, and that he had intended to

¹ “Burnet, iv. 141. I suppose the counsels’ presents varied a good deal, according to the prevailing opinion of the Chancellor’s tenure of his office. If it was suspected that he might go out before the first day of Hilary Term (23rd of January), they must have dreadfully dwindled away.”

confine the refusal to the presents of the Counsel practising before him." pp. 296—298.

Here we have an instance of a noble act of self-denial, arising from a pure love of justice, which, so far from being applauded at the time, was loudly complained of by most of the profession, and but coldly received by official colleagues. There is, however, another judgment to be given, that by Posterity, which has awarded to Lord Cowper his due merit. Let this encourage similar acts of patriotism. The anecdote which immediately follows, as given from the Journal of Lady Cowper, is very amusing:—

"The Earl of Nottingham, when Chancellor, used to receive them [the counsel, &c.] standing by a table, and at the same time he took the money to lay it upon the table, he used to cry out, 'OH, TYRANT CUTHOM!' (for he lisped.)—My Lord forbid the bringing them." Vol. iv. pp. 299, 300.

Lord Macclesfield's early life is well told:—

"To prosecute his profession with more advantage he established himself at Derby, a flourishing town, in which a wealthy client of his father had lately settled in trade, and promised to patronise him. Here he prospered beyond his most sanguine hopes, and from his great skill and diligence, in a year or two his business, in point of extent and respectability, was equal to that of any attorney in the county. We know no further particulars of his history, while he remained in this department of the profession, except that his house in Derby was in Bridge Street, at the foot of the bridge, next the Three Crowns. We may imagine that, when the assizes came round, he was at first struck with immense awe at beholding the judges in their scarlet robes, and could scarcely venture to speak to the leaders of the Midland circuit on delivering them briefs in the causes which he had entered for trial; that his reverence for these dignitaries gradually dwindled away; that he began sometimes to think he himself could have examined witnesses quite as well as the barristers employed by him, and even by making a better speech to the jury have won verdicts which they lost; that he was likewise hurt by the distance at which he was in public kept by all members of the superior grade of the profession, while some of them were intensely civil to him in private; that he thought it hard, having with great labour prepared a case of popular expectation so as to insure vic-

tory, another should run away with all the glory; that he measured himself with those who were enjoying high reputation as advocates, and had the prospect of being elevated to the bench; that, possessing the self-respect and confidence belonging to real genius, he felt himself superior to them; and that he sickened at the thought of spending the rest of his days in drawing cases, in receiving instruction from country bumpkins to bring foolish actions, in preparing briefs, and in making out bills of fees and disbursements which any discontented client might tax before the master. Whatever his train of feeling or of reasoning might be, he soon resolved that he would quit his position of an attorney for that of a barrister. Not having been at any public school or university, and having started in life so very early on his own account, he was still quite a young man when he had laid by enough decently to support him for some years to come. Instead of going on to accumulate a large fortune, which was certainly within his reach, he nobly put all to hazard that he might invest himself in the long robe. He is said to have had that presentiment of future greatness which sometimes springs up under very adverse circumstances, and leads to victory over all obstacles. He accordingly renounced his profitable business as an attorney at Derby, and removed to keep his terms as a student of law in the Inner Temple." Vol. iv. pp. 503, 504.

Let us see what was his success:—

"The subject of this memoir is a striking instance of the scope afforded by our constitution to talent and energy. He was not suddenly elevated by the caprice of a despot from a servile condition to rule the state. The possibility of such a promotion shows an arbitrary form of government, and a barbarous state of society. The power of rising to distinction in a free country ought to be by the possession of useful qualities, and the performance of public services. The government that employs and rewards the meritorious aspirant, ought merely to ratify the opinion of his fellow-citizens, and to carry into effect the wishes of an enlightened community. Parker got on in the world first by diligence in his father's little office at Leake, and rendering services to the wealthy manufacturer who translated him to Derby; then by showing himself superior in intelligence and activity to the other attorneys of that place;—then by being the greatest winner of verdicts of all the barristers on the Midland circuit;—then by proving the most formidable opponent which Westminster Hall could supply to oppressive prosecutions of the press by the Attorney General;—

forms into English; that great delays would arise in the administration of justice; that a wide door would be opened to fraud; that prosecutions for crimes would be rendered more difficult and expensive; that the recovery of small debts would become almost impossible; and that the supposed reform would multiply law suits instead of bringing ease to the people.' Lord Raymond, the Chief Justice of the King's Bench, speaking, I presume, the sentiments of all his brother judges, strongly opposed the measure, availing himself of the weapons of ridicule as well as of reason, and saying, 'that if the bill passed, the law might likewise be translated into Welch, since many in Wales understood not English.' The Duke of Argyle, after a general defence of the bill, said he was glad that nothing could be brought forward against it by the Chief Justice of the King's Bench, as wise and learned a lord as ever sat in that house — beyond a joke. Amidst heavy forebodings of future mischief the bill passed, and mankind are now astonished that so obvious a reform should have been so long deferred." Vol. iv. pp. 641, 642.

We have but few drawbacks to the general commendation which is fairly due to Lord Campbell's labours. We find one in a passage to which we deem it absolutely necessary to call attention, as it is calculated to give the student a wrong impression on a point of some importance.

Speaking of Lord Somers, Lord Campbell says:—

"I should say that the great debt of gratitude we owe him as an Equity Judge, arises from his *introducing* and establishing the principles and doctrines of the civil law, on the subjects of legacies, trusts, charities, and all others to which they are properly applicable. The early Chancellors were well versed in the civil as well as the canon law, but they never thought of laying down general rules; and from the time that Equity began to assume a systematic form, Lord Nottingham was the only Chancellor who had ever *opened the Pandects, or read any commentaries* on that immortal code." Vol. iv. pp. 111, 112.

Now there are a great many errors in this account. We have already shewn that the Clerical Chancellors did decide according to precedent.¹ Nor can we admit that Lord Somers introduced the doctrines of the civil law into the Court of Chancery, on the subjects of trusts, legacies, or charities.

¹ 4 L. R. 12. *et seq.*

As to trusts, the most familiar text book will show that they were borrowed directly from the civil law by the ecclesiastics; the doctrines as to legacies were introduced at least as early as the reign of Queen Elizabeth¹, and were taken from the rules already laid down by the Ecclesiastical Courts, and the jurisdiction of the Court of Chancery as to charities was at least as old as the reign of Henry VI.²

As to the statement, that Lord Nottingham was the only Chancellor who had ever "opened the Pandects," this, though somewhat ambiguously worded, must be meant to apply to the time when *lay* Chancellors were first intrusted with the Great Seal. But surely both Sir T. More and Lord Bacon were versed in the Civil Law, as indeed we distinctly infer from Lord Campbell's previous volumes. We must say further, that it would have been as well if Lord Campbell had stated precisely when, in his opinion, Equity did assume a systematic form. We have now a large body of authority brought before the profession by a competent person, Mr. Spence, which has for its object to prove that the principal subjects of Equitable Jurisdiction were introduced by the Ecclesiastical Chancellors and Masters in Chancery. Mr. Spence may be wrong, but then he must be shown to be wrong, not by mere assertion, but by displacing his authorities.

There is also, on some occasions, a display of a too lively imagination as to the incidents which occur in these Lives. Treating the known facts, as an advocate sometimes does his brief, Lord Campbell builds on them a superstructure, which may be sound if it is true, but which is not supported by authority, and which certainly, in some cases, is overthrown by the authorities. An instance of this occurs in the Life of Lord Camden. Speaking of him, it is said—

"He was soon after sent to Eton, and, on account of the reduced circumstances of his family, he was placed upon the foundation. But in those days *the collegers and oppidans were on the most friendly footing, and here he formed a friendship which lasted through life, and not only led to his advancement but was of*

¹ See authorities cited, Spence, Eq. Jur. 582.

² See authorities cited, Spence, Eq. Jur. 588.

essential benefit to the state, with William Pitt—then flogged for breaking bounds—afterwards the ‘Great Commoner’ and ‘Earl of Chatham.’” —Vol. v. p. 231.

And subsequently it is said that, by reason of this school-friendship, Pitt was “in the habit of consulting him respecting questions of a legal or constitutional nature,” p. 238; and afterwards, that Pitt, being “at the head of affairs, with dictatorial authority, resolved, both on public and private grounds, that his old Etonian friend should now be provided for:” he declared “that Pratt should be Attorney General,” p. 238 — with other similar allusions. This fact, of the Eton friendship between Pitt and Camden, is thus made the pivot on which the success of the latter turns. Now Lord Campbell cites no authority whatever for this statement, and, in the absence of any, we must look to the facts which are to be found on the subject. It is not known when Pitt went to Eton, it is only known that he went “early.”¹ He was born in 1708, and it may be supposed from this that he went about ten years afterwards.

It is certain that he went to Trinity College, Oxford, at eighteen, that is in the year 1726.² Pratt was born, as we believe, in 1714, [not as Lord Campbell says, “in the last year of the reign of Queen Anne.” p. 231.] He went to Eton, as Lord Campbell states, *after* he was ten. p. 230. He got “King’s” in 1731. If, then, Pitt stayed at Eton until 1726, and Pratt went to it before that time, it is true that they were at school together for a short time: but we need not remind our readers that there is usually no such thing as friendship between an Eton boy of ten and another of sixteen. Their studies, their schools, their habits, are totally distinct. It is a possible thing, but without some authority we cannot believe it. The point is in itself of little importance, but we notice it that in the next edition either these passages may be reconsidered, or the authority given.

There is another inaccuracy in Lord Campbell’s account. Pitt was not an oppidan, but was also on the foundation.³

¹ Thackeray, vol. i. p. 2.

² Thackeray, vol. i. p. 2.; pref. to Chatham Correspond. vol. i. p. 2.

³ Thackeray, vol. i. p. 2.

This, it is fair to state, favours Lord Campbell's presumption. It is, however, also to be noticed that Thackeray, in mentioning Pitt's contemporaries at Eton, does not name Pratt.

There are one or two other inaccuracies. At vol. v. p. 110, noticing, with proper indignation, the atrocious murder of James Stewart, in 1752, Lord C. says, "the judge was the Duke of Argyle, the jury were all Campbells, and a poor *Macdonald* was tried for the murder of a Campbell." It was a *Stewart of Appin*, who was thus sacrificed by the Clan Campbell.¹ At vol. iv. p. 221, alluding to the death of Lord Somers, "a plain monument is erected to him by his surviving sister;" while at p. 240 we are told that his "heirs were his *two* sisters."

But we now resume with great pleasure our notice of some traits and anecdotes of various Chancellors.

First as to Lord Somers, in many respects the greatest man who ever held the Great Seal. We are told that as a boy he was always remarkably studious and contemplative. "Though the brightest boy in the college school, instead of joining his young companions in their boyish amusements, he was seen walking and musing alone, not so much as looking on while they were at play."

Lord Campbell thus continues:—

"He was sometimes allowed to retire to the family-house in the parish of Severn Stoke, and the room which he occupied, and in which he read night and day, used afterwards, when he became a great man, to be pointed out as 'Somers's Study.' But he chiefly resided at Whiteladies, the society of which he was sorry to exchange for his books. A scheme of life prevailed there of a very extraordinary description. Somers, the father, having at the Restoration obtained a pardon under the Great Seal (which is still

¹ The trial is given at great length in the "State Trials," vol. xix. pp. 1—262, and will amply repay perusal. Stewart's whole conduct in the matter is that of a Christian and a gentleman. That part of his speech, after condemnation, addressed to the clan to which he belonged, has always struck us with admiration: "My dearest friends and relations, I earnestly recommend and entreat you, for God's sake, that you bear no grudge, hatred, or malice to those people, both evidence and jury, who have been the means of this my fatal end. Rather pity them, and pray for them, as they have my blood to answer for. And though you hear my prosecutors load my character with the greatest calumny, bear it patiently, and satisfy yourselves with your own conviction of my innocence." 19 *St. Tr.* 259.

preserved in the family), and continuing to flourish in his profession, had his office established in the Old Nunnery.¹ The mansion was inhabited by several other families connected by blood and marriage, and they consorted in a style of which it is now difficult to give or to form an idea. 'Their mornings were employed by each in their respective occupations—the culture of a large farm—the clothing trade, then in a flourishing state—the producing and manufacturing teasels, woad, madder, and all dyeing materials—the making of bricks and tiles in immense quantities, to supply the demand occasioned by rebuilding the ruined city and suburbs.² The labours of the day over, they repaired for refreshment to one common table in the great hall of the Old Nunnery, where seldom fewer than twenty or thirty relations and friends of the families assembled daily, and spent their evenings in the utmost cheerfulness and conviviality. The products of the farm, the supplies of fish and game, and viands of every kind, received constantly from the country connections, furnished their table with abundant plenty, and entitled such contributors to a place at it without ceremony or reserve. The annual slaughter of two brawns marked the festivity of Christmas.'³ Vol. iv. pp. 67, 68.

Somers as an Ex-Chancellor.

"Apart from politics, his conduct is still more to be admired, as being more rare among English lawyers, who generally, while in practice, or in office, devote themselves exclusively to professional avocations, and in their retirement, left without mental resources, waste their declining years in frivolous occupations, or in vain regrets. Lord Somers presents the *beau ideal* of an Ex-chancellor, active in his place in parliament, when he could serve the state, and devoting his leisure to philosophy and literature. He had long been a Fellow of the Royal Society; he now regularly attended its meetings, and assisted in its transactions; and being elected the president, he did every thing in his power to extend its credit and its usefulness. Having held this distinguished post five years, he gracefully resigned it to Sir Isaac

¹ "He is not supposed to have committed any offence requiring a special pardon, beyond firing over the head of the parson at Severn Stoke, while in the pulpit; but being a lawyer, he perhaps remembered the observation of Sir Edward Coke, "that good men will never refuse God and the King's pardon, because every man doth often offend both of them."—3 *Inst. C.* 105."

² "From which Lord Somers was afterwards, in abusive ballads, called the *brickmaker's son*."

³ Cooksey, 14.

Newton. He made a noble use of the wealth he had honourably acquired, by purchasing a fine collection of paintings, engravings, medals, and books — becoming possessed of almost every edition of the Bible that had ever been printed, and of an immense mass of tracts, printed and manuscript, on English history and antiquities. He lived much with literary men, and liberally aided such as were oppressed by poverty. On Addison's return from the continent, he cordially embraced him; he introduced him into the Kit-Cat Club, and visited him in his garret in the Haymarket,¹ where the poor poet was found out by Godolphin to celebrate the victories of Marlborough. Lord Somers was rewarded by the dedication of his friend's 'Travels in Italy;' and as he seemed now for ever banished from office, he could have no misgivings as to the sincerity of such sentiments as these, from the author of 'The Campaign,' with the praises of which all England was ringing.

"Among the other wits of Anne's reign, he was likewise on the most familiar footing with Swift, who as yet, having nothing to hope from the Tories, dedicated to him 'The Tale of a Tub,' stating how the 'the bright example of his patron's virtue would adorn the history of the late reign,' describing him as 'the sublimest genius of the age for wit, learning, judgment, eloquence, and wisdom,' and celebrating him for 'his discernment in discovering, and readiness in favouring deserving men.'" Vol. iv. p. 174—177.

We must now pass to Lord Hardwicke; and first, as to his early life:

"He gained the entire good will and esteem of his master, who observing in him abilities and application that prognosticated his future eminence, entered him as a student in the Temple, and suffered him to dine in the Hall during the terms. But his mistress, a notable woman, thinking she might take such liberties with a *gratis* clerk, used frequently to send him from his business on family errands, and to fetch in little necessities from Covent Garden and other markets. This, when he became a favourite with his master and intrusted with his business and cash, he thought an indignity, and got rid of it by a stratagem, which prevented complaints or expostulation. In his accounts with his master, there frequently occurred 'coach-hire for roots of celery and turnips from Covent Garden, and a barrel of oysters from the fishmongers,' &c., which Mr. Salkeld observing, and urging on his wife the impropriety and ill-housewifery of such a practice, put an end to it." Vol. v. p. 4.

¹ This incident is not related of Lord Somers, but of Secretary Boyle.—Ed

Hardwicke's conduct on Macclesfield's fall.

"On the appointment of managers to conduct the prosecution at the bar of the House of Lords, the Attorney General ought to have been of the number, but he begged to be excused on account of the private friendship subsisting between him and the late Lord Chancellor; and we are told, that he had great 'difficulty in obtaining his request.' It is not easy to specify any other step he could have taken to show his sympathy. Yet I confess, that I should have been gratified to have heard that he tried to turn the tide of public opinion, by a pamphlet 'On the Sale of the Office of Master in Chancery, proving that it has been at all times transferred for a valuable Consideration;' or that he had made one gallant speech in his place in the House of Commons, for the man who had such claims to public applause, and who had drawn down ill-will upon himself by befriending the friendless. Surely Sir Robert Walpole, who was not without generosity of sentiment as well as good nature (although he was anxious to rescue his government from the imputation of screening high delinquency), would not have discarded his Attorney General for one solitary indiscretion. At all events, it would have much consoled me to have known that Sir Philip visited Lord Macclesfield in the Tower, was in the habit of cheering his retreat at Derby, and showed a grateful solicitude to vindicate his memory. But I am afraid that he left the condemned Chancellor to his fate, like 'others whom his former bounty fed,' eager only for his own aggrandizement." Vol. v. p. 27.

Lord Hardwicke as an Ex-chancellor.

"It is a curious fact, that although George II. had taken leave of him very tenderly, and had pressed him to come frequently to Court, when he presented himself a few days after at the levee in a plain suit of black velvet, with a bag and sword, he was allowed to make his bow in the crowd without the slightest mark of royal recognition. But as he was retreating, surprised, and mortified, he was called back by the Lord in waiting; the King apologised for not having known him when he first appeared without his full bottom, his robes, and the purse with the Great Seal in his hand, and renewed to him the assurance that his great services to the crown were well known and remembered.¹ Vol. v. pp. 139, 140.

¹ "Had he worn such a uniform as that invented by George IV. for Ex-chancellors, very much like a Field Marshal's, he could not have been mistaken for a common man."

Lord Hardwicke as a Law-reformer.

"It is mortifying to consider, that although he deserves such high commendation for his upright and enlightened administration of justice, he cannot be praised for any attempt to amend our institutions by legislation. During the twenty years of his sway, the act requiring legal proceedings to be carried on in the English language, passed by Lord Chancellor King, still remained the most recent improvement, and the principle was acted upon which was soon after brought forward by Blackstone in his '*Commentaries*' that our whole juridical system had reached absolute perfection. The only change introduced was a great addition to the severity of the penal code. Many felonies were now rendered capital, which before were only liable to be punished by transportation, and many frauds which at common law were simple misdemeanours, such as forgery of deeds and negotiable instruments, being made capital felonies, in practice were always punished with death; although this bloody code did not reach its full measure of atrocity till towards the close of the reign of George III. when it was defended and eulogised by Lord Eldon." Vol. v. p. 62.

"In praising Lord Hardwicke as an Ex-chancellor, a deduction should be made in respect of his having done so little to improve the laws and institutions of the country, when he had abundant leisure to prepare measures for this purpose; and one would have supposed sufficient influence to carry them through. From his long experience at the bar, and as a Judge in courts of law and equity, many points must have presented themselves to him, wanting '*the amending hand.*' His own emoluments no longer in any degree depended upon the continuation of abuses, and he might surely have discovered some which might have been corrected without materially affecting the offices and reversions held by the family. Yet he suffered six years of health and mental vigour allotted to him after his resignation to pass away unmarked by a single attempt to extend his fame as a legislator. It is possible that he could get no one to second him effectually; and that if he had carried very useful bills through the House of which he was a member, they would have been neglected or thrown out '*elsewhere.*'"¹ Pp. 147, 148.

Let us now advert to one who, although not so great a

¹ "I can say, of my own knowledge, that this state of things has since actually existed. At different periods of our history, it has been very difficult to draw the notice of the representatives of the people to measures for the amendment of the law."

lawyer, is a far more interesting person. Lord Campbell had previously observed "that the three greatest Chancellors after the Revolution were the sons of attorneys, and that two of them had not the advantage of a university education." Vol. v. p. 2. These were Somers, Macclesfield, and Hardwicke, of whom the two latter were never at any university. Let us see how a Chief Justice's son thrives. It is, to the true credit of the Bench, that he must take his chance with the rest. Lord Camden's early career is thus described:—

"But very differently did young Pratt fare from the man whose rapid career had recently been crowned by his elevation to the woolsack. Yorke, the son of an attorney, himself an attorney's clerk, and intimate with many attorneys and attorneys' clerks, overflowed with briefs from the day he put on his robe, was in full business his first circuit, and was made Solicitor General when he had been only four years at the bar. Pratt, the son of the Lord Chief Justice of England, bred at Eton and Cambridge, the associate of scholars and gentlemen, though equally well qualified for his profession, was for many years without a client. He attended daily in the Court of King's Bench, but it was only to make a silent bow when called upon 'to move;' he sat patiently in chambers, but no knock came to the door, except that of a dun, or of a companion as briefless and more volatile. He chose the Western Circuit, which his father used to 'ride,' and where it might have been expected that his name might have been an introduction to him; but spring and summer, year after year, did he journey from Hampshire to Cornwall, without receiving fees to pay the tolls demanded of him at the turnpike gates, which were then beginning to be erected. During the summer circuit, in the year 1741, his nag died, and from bad luck, or from the state of his finances, he was only able to replace him by a very sorry jade. With difficulty did he get back to London, — whence he thus wrote to a friend:— 'Alas! my horse is lamer than ever — no sooner cured of one shoulder than the other began to halt. My losses in horse flesh ruin me, and keep me so poor that I have scarce money enough to bear me in a summer's ramble; yet ramble I must if I starve to pay for it.'" Vol. v. pp. 232, 233.

We must still find room for one or two traits of Lord Thurlow; and, first as to his early habits:—

"His contemporary, Craddock, who was admitted to his entire

intimacy, and from whom he concealed nothing, writes, 'It was generally supposed that Thurlow in early life was idle; but I always found him close at study in a morning, when I have called at the Temple; and he frequently went no further in an evening than to Nando's, and then only in his *deshabille*.' It is quite clear, from his successful combats with the members of the 'Literary Club,' and with the first lawyers in Westminster Hall, that he had effectually, though irregularly, devoted himself to literature and law. Let me, then, anxiously caution the student against being misled by the delusive hope which the supposed idleness of Thurlow has engendered, that a man may become a great lawyer, and rise with credit to the highest offices, without application. Thurlow never would have been Chancellor if he had not studied his profession, and he would have been a much greater Chancellor, and would have left a much higher name to posterity, if he had studied it more steadily." Vol. v. p. 486.

Lord Thurlow's first great success.

"According to legal tradition, soon after the decision of the Court of Session in Scotland, that the alleged son of Lady Jane Douglas was a supposititious child purchased at Paris, the question, which excited great interest all over Europe, was discussed one evening at Nando's Coffee-house—from its excellent punch, and the ministrations of a younger daughter of the landlady—still Thurlow's favourite haunt. At this time, and indeed when I myself first began the study of the law, the modern club system was unknown; and (as in the time of Swift and Addison) men went in the evenings for society to coffee-houses, in which they expected to encounter a particular set of acquaintance, but which were open to all who chose to enter and offer to join in the conversation, at the risk of meeting with cold looks and mortifying rebuffs. Thurlow, like his contemporary Dr. Johnson, took great pains in gladiatorial discussion, knowing that he excelled in it, and he was pleased and excited when he found a large body of good listeners. On the evening in question, a friend of his at the English bar strongly applauded the judgment against the supposed heir of the house of Douglas. For this reason, probably, Thurlow took the contrary side. Like most other lawyers, he had read the evidence attentively, and in a succinct but masterly statement he gave an abstract of it, to prove that the claimant was indeed the genuine issue of Lady Jane and her husband,—dexterously repelling the objections to the claim, and contending that there were admitted facts which

were inconsistent with the theory of the child being the son of the French rope-dancer. Having finished his argument and his punch, he withdrew to his chambers, pleased with the victory which he had obtained over his antagonist, who was no match for him in dialectics, and who had ventured to express an opinion upon the question without having sufficiently studied it. Thurlow, after reading a little brief for a motion in the King's Bench, which his clerk had received in his absence, went to bed, thinking no more of the Douglas cause, and ready, according to the vicissitudes of talk, to support the spuriousness of the claimant with equal zeal. But it so happened that two Scotch law agents, who had come up from Edinburgh to enter the appeal, having heard of the fame of Nando's, and having been told that some of the great leaders of the English bar were to be seen there, had at a side-table been quiet listeners of the disputation, and were amazingly struck with the knowledge of the case, and the acuteness which Thurlow had exhibited. The moment he was gone, they went to the landlady and inquired who he was? They had never heard his name before; but finding that he was a barrister, they resolved to retain him as junior to prepare the appellant's case, and to prompt those who were to lead it at the bar of the House of Lords. A difficulty had occurred about the preparation of the case, for there was a wise determination that, from the magnitude of the stake, the nature of the question, and the consideration that it was to be decided by English Law Lords, the *plaidoyer* should be drawn by English counsel, and the heads of the bar who were retained—from their numerous avocations—had refused to submit to this preliminary drudgery.

“Next morning a retainer, in ‘*Douglas v. The Duke of Hamilton*,’ was left at Thurlow's chambers, with an immense pile of papers, having a fee indorsed upon them ten times as large as he had ever before received. At a conference with the agents (who took no notice of Nando's) an explanation was given of what was expected of him; the Scotchmen hinting that his fame had reached the ‘Parliament House at Edinburgh.’ He readily undertook the task, and did it the most ample justice, showing that he could command, upon occasion, not only striking elocution but patient industry. He repeatedly perused and weighed every deposition, every document, and every pleading, that had ever been brought forward during the suit; and he drew a most masterly case, which mainly led to the success of the appeal, and which I earnestly recommend to the law student as a model of lucid arrangement and forcible reasoning.” Vol. v. pp. 489, 490.

Thurlow as Chancellor.

“He was tolerably well qualified to preside in the Court of Chancery from his natural shrewdness, from the knowledge of law which he had acquired by fits and starts, and from his having been for some years in full practice as an equity counsel. But he had never devoted himself to jurisprudence systematically; he was almost entirely unacquainted with the Roman civil law as well as with the modern codes of the Continental nations; and, unlike Lord Nottingham, Lord Hardwicke, and the Chancellors whose memory we venerate, upon his elevation to the bench he despised the notion of entering on a laborious course of study to refresh and extend his juridical acquirements. Much engrossed by politics, and spending a large portion of his time in convivial society or in idle gossip with his old coffee-house friends, he was contented if he could only get through the business of his court without complaints being made against him by the suitors, or any very loud murmurs from the public. Permanent fame he disregarded or despised. He was above all taint or suspicion of corruption, and in his general rudeness he was very impartial; but he was not patient and pains-taking; he sometimes dealt recklessly with the rights which he had to determine, and he did little in settling controverted questions or establishing general principles. Having been at the head of the law of this country for near thirteen years, he never issued an order to correct any of the abuses of his own court, and he never brought forward in parliament any measure to improve the administration of justice. He is said to have called in Hargrave, the very learned editor of Coke upon Littleton, to assist him in preparing his judgments, and some of them show labour and research; but he generally seems to have decided off-hand without very great anxiety about former authorities. Frequently he employed Mr. Justice Buller, a very acute special pleader, and *nisi prius* lawyer, to sit for him in the Court of Chancery. On resuming his seat, he would highly eulogise the decisions of ‘one whom he, in common with all the world, felt bound to respect and admire.’ But being privately asked ‘how Buller had acquired his knowledge of equity?’ ‘Equity,’ said he; ‘he knows no more of it than a horse, but he disposes somehow of the cases, and I seldom hear more of them.’ So fiercely did he spring on a luckless counsel or solicitor, that he generally went by the name of the ‘Tiger,’ and sometimes they would out of compliment, call him the ‘Lion,’ adding, that *Hargrave was his ‘provider.’*”

"His habit of profane swearing he could not always control, even when on the bench, and those who were sitting under him near the mace and the purse, occasionally heard a muttering of strange oaths. Yet some supposed that, in reality, he had a great deal of good humour under an ostentatiously rough exterior, and of this he would occasionally give symptoms. It is related that once, at the adjournment of the court for the long vacation, he was withdrawing without taking the usual leave of the bar, when a young barrister exclaimed in a stage whisper, 'He might at least have said d—n you.' The Chancellor hearing the remark, returned, and politely made his bow." Vol. v. pp. 521, 522.

Lord Thurlow from the first resolved to be the ruler of the House of Lords, and it will be seen that he was successful in the attempt.

"At the opening of the session of parliament, on the 26th of November following, the Lord Chancellor on his knee delivered to George III. the royal speech, announcing that France had gone to war, and was assisting the revolted colonies in America. He abstained from taking part in the debate which followed upon the address; but on Lord Rockingham's motion a few days after, respecting the proclamation issued by the English commissioners in America, he made his maiden speech as a peer, and showed that he had not changed his disposition with his rank. He at once poured red-hot shot into the whole of the opposition. He began with Hinchliffe, Bishop of Peterborough, who had inveighed against the employment of savages in carrying on the war in America, had objected to an item in the army extraordinaries, 'scalping-knives and crucifixes for the Indians,'—had declared, that if such was the Christianity we were to teach them, it would be better that they should never hear of the name of Christ, — and was understood to lament the 'fruitless desolation' which such measures produced.— Lord Chancellor. 'The Right Reverend Prelate talks of "fruitless desolation," — an expression which carries no meaning, and is neither sense nor grammar. It is not supported by any figure of speech, or by any logic, or even by any vulgarism that I ever heard of. "Fruitless desolation," my Lords, is rank nonsense. I was not aware before that "desolation" might be "fruitful." To negative what is not to be found in nature, and what the imagination cannot conceive, is a species of oratory — not only incongruous, but so nonsensical, that it admits of no answer.' He next addressed him-

self to an observation of the Duke of Grafton, who had said that ministers carried their measures by corruption; 'This,' he said, 'was well calculated for the temporary purpose of debate, as it required no proof, and admitted of no refutation; and this was all that was intended by it; but he hoped that it would have a contrary effect, and that an impartial nation would honour and respect those against whom nothing could be brought, except such indiscriminate and ill-founded charges.' He then attacked the Duke of Richmond and Lord Shelburne with equal acrimony, and concluded by declaring that, 'having in vain appealed to the reason and good sense of America, the only course was to endeavour to influence by their fears those who could not be wrought upon by the nobler principles of affection, generosity, or gratitude.' The Bishop of Peterborough explaining, said, the expression he had used was 'fruitless evils,' not 'fruitless desolation,' although he contended that a desolation, from which no good consequences were ever promised or expected, might well be termed a fruitless desolation. — The Lord Chancellor. 'I beg pardon of the Right Reverend Prelate, if I have mistaken his words. But, my Lords, I am equally at a loss to know what sort of "evils" are "fruitful" — except of evil. Are some evils productive of good? Let the Right Reverend Prelate more distinctly classify his evils, for at present I am at a loss to distinguish between evils that are fruitless and evils that are fruitful.' He had an explanation almost equally uncourteous with Lord Shelburne; but he received a calm and dignified rebuke from Lord Camden, who asserted the import of the proclamation in question to be 'We have tried our strength; we find ourselves incapable of conquest; and, as we can't subdue, we are determined to destroy.' As yet the opposition in the Lords could only muster 37 to 71." Vol. v. pp. 531, 532.

He appears to far greater advantage in the noble rebuke he gave to the Duke of Grafton, which, although probably familiar to many of our readers, must always be read by lawyers with pleasure.

"He was becoming highly unpopular; and as his demeanour on the woolsack was very much like that of Lord Chancellor Jeffreys, if a proper course had been pursued to check him, he might have been put down as effectually; but, luckily for him, instead of being reprimanded for his arrogant manners, he was taunted with his mean birth; an opportunity was offered to him, which he daringly and dexterously improved, of exalting himself, and the suppressed

rebellion ended in his establishing a permanent tyranny over the whole body of the peerage.

"We have a very lively account of this scene, from an eyewitness: 'At times,' says Mr. Butler in his *Reminiscences*, 'Lord Thurlow was superlatively great. It was the good fortune of the remniscent to hear his celebrated reply to the Duke of Grafton, during the inquiry into Lord Sandwich's administration of Greenwich Hospital. His Grace's action and delivery, when he addressed the House, were singularly dignified and graceful; but his matter was not equal to his manner. He reproached Lord Thurlow with his plebeian extraction and his recent admission into the peerage; particular circumstances caused Lord Thurlow's reply to make a deep impression on the remniscent. His Lordship had spoken too often, and began to be heard with a civil but visible impatience.¹ Under these circumstances he was attacked in the manner we have mentioned. He rose from the woosack, and advanced slowly to the place from which the Chancellor generally addresses the House², then fixing on the Duke the look of Jove when he grasped the thunder, 'I am amazed,' he said, in a loud tone of voice, 'at the attack the noble Duke has made on me. Yes, my Lords,' considerably raising his voice, 'I am amazed at his Grace's speech. The noble Duke cannot look before him, behind him, or on either side of him, without seeing some noble Peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel that it is as honourable to owe it to these, as to being the accident of an accident? To all these noble Lords the language of the noble Duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do; but, my Lords, I must say, that the peerage solicited me, not I the peerage. Nay more, I can say and will say, that as a Peer of Parliament, as Speaker of this Right Honourable House, as Keeper of the Great Seal, as Guardian of his Majesty's conscience, as Lord High Chancellor of England, nay, even in that character alone in which the noble Duke would think it an affront to be considered—as a MAN—I am at this moment as respectable—I beg leave to add, I am at this moment as much respected—as the proudest Peer I now look down upon.' The effect of this speech, both within the walls of Parliament and out of them, was

¹ "I conjecture that he had given umbrage by his dictatorial tone much more than by the frequency of his speeches."

² The top of the Duke's Bench.

prodigious. It gave Lord Thurlow an ascendancy in the House which no Chancellor had ever possessed; it invested him, in public opinion, with a character of independence and honour; and this, though he was ever on the unpopular side, in politics, made him always popular with the people." Vol. v. pp. 531—534.

Thurlow in retirement: —

"He now spent the greatest part of his time at a villa he had purchased near Dulwich. The taste which, in early life, he had contracted for classical literature, proved during some months a resource to him. But reading without any definite object he found tiresome, and he is said to have suffered much from the *tedium vitæ*. His principal relief was in getting young lawyers to come to him in the evening to tell him what had been going on in the Court of Chancery in the morning, and he was in the habit of censuring very freely the decisions of his successors.¹ For about two years he pretty regularly attended the hearing of appeals and writs of error in the House of Lords, but at the end of that period he refused to come any longer. Having no pension or retired allowance, he did not consider that the public had any claim upon his time²; he could not well endure to appear as a subordinate where he had so long dictated; and as there was no reasonable prospect of his return to office, he was indifferent about keeping up his law by acting as a Judge. In January, 1793, his mortification was increased by seeing the Great Seal in the possession of his rival Wedderburn, on the secession of a large section of the Whig party from Mr. Fox—an event to which Thurlow's own retirement had materially contributed. When he showed himself in the House, he was observed to look sulky and discontented. He was even at a loss where to seat himself; for he hated equally the government and the opposition, and there was no precedent for an ex-Chancellor placing himself on a cross-bench. He took no part in the important debates which arose on the French Revolution, or on the origin of the war with the

¹ "Mr. Leach (afterwards Sir John, and Master of the Rolls) was his chief reporter. It is curious that Mr. James Allan Park, afterwards a judge, acted in the same capacity to Lord Mansfield when retired from the Court of King's Bench."

² "Although there was then no parliamentary retired allowance for ex-Chancellors, they were better off than at present. Thurlow was a Teller of the Exchequer, and had given sinecures to all his relations, for one of which his nephew now receives a commutation of 9000*l.* a year."

French republic. In the session of 1793, he contented himself with opposing a bill to increase the sum for which a debtor might be arrested from 10*l.* to 20*l.*; and expressing an opinion that there is no appeal in criminal cases from the Courts in Scotland to the House of Lords. In the beginning of the following year he resisted the attempt that was made to obtain a reversal of the atrocious sentence of transportation passed by the Court of Justiciary, at Edinburgh, on Muir, for advocating parliamentary reform."

Lord Thurlow as a law reformer : —

"As to legal reform, instead of imitating those who held the Great Seal in the time of the Commonwealth and soon after the Revolution, he not only originated no measures of improvement himself, but he violently and pertinaciously opposed those which were brought forward by others. Mr. Pitt, though thwarted by Thurlow, really seems to have had a desire to reform our jurisprudence as well as our commercial policy, till the breaking out of the French Revolution, — when the terror of Jacobinism put an end to all improvement, and it was unwisely determined to try to cure disaffection by rendering the laws more arbitrary." Vol. v. p. 634.

We may indeed consider that the eighteenth century was a blank so far as the improvement of the law was concerned. The time of the Commonwealth stirred up the minds of men on the subject, and the swell had not subsided in the reign of Charles II. For more than a century things remained as they were; and for the first quarter of the present century, a vain resistance was attempted to those measures in which all are now agreed.

Lord Thurlow's last appearance : —

"Thurlow had resigned the Great Seal while I was still a child residing in my native land; but when I had been entered a few days a student at Lincoln's Inn, it was rumoured that, after a long absence from parliament, he was to attend in the House of Lords, to express his opinion upon the very important question, 'whether a divorce bill should be passed on the petition of the wife, in a case where her husband had been guilty of incest with her sister?' — there never hitherto having been an instance of a divorce bill in England, except on the petition of the husband for the adultery of

the wife. When I was admitted below the bar, Lord Chancellor Eldon was sitting on the woolsack; but he excited comparatively little interest, and all eyes were impatiently looking round for him who had occupied it under Lord North, under Lord Rockingham, under Lord Shelburne, and under Mr. Pitt. At last there walked in, supported by a staff, a figure bent with age, dressed in an old-fashioned grey coat, with breeches and gaiters of the same stuff, a brown scratch wig, tremendous white bushy eyebrows, eyes still sparkling with intelligence, dreadful 'crows' feet' round them, very deep lines in his countenance, and shrivelled complexion of a sallow hue,—all indicating much greater senility than was to be expected from the date of his birth as laid down in the Peerage." Vol. v. pp. 478, 474.

We shall give one anecdote of a great lawyer not a Chancellor, which records one of the greatest triumphs of the profession. This relates to the elevation of Lord Mansfield.

"The immediate cause of the change of ministry was the sudden death of Sir Dudley Ryder, Lord Chief Justice of the Court of King's Bench. Pitt was at this time in hot opposition, and with such a theme as the disgrace of our flag, was ready on the meeting of Parliament actually to crush the trembling Premier. The only person in the House of Commons who 'had courage even to look him in the face,' was Murray, the Attorney-General, who indeed had fought many a stout battle with him, and who, if so inclined, might still have entered the lists against him as the champion of the government, but who now peremptorily insisted on his right to the vacant chiefship. He was not only, after Pitt, the best speaker in the House of Commons, but he was decidedly the greatest lawyer at the English bar; he had served many years as a law officer of the Crown with the highest distinction, and having gallantly and faithfully exerted himself in the conflict while there was a chance of victory, now that a general defeat was inevitable, he considered that he might honourably act upon the principle '*Sauve qui peut.*' Newcastle, eager to retain him in the House of Commons as a forlorn hope, plied him with various proposals—a Tellership of the Exchequer, or the Duchy of Lancaster for life, or a pension of 2000*l.* a-year for life, in addition to the profits of his office as Attorney-General. Nay, the bidding rose to 6000*l.* a-year of pension, but Murray was inexorable; nor would he even on any terms agree to remain in the House of Commons only one session longer, or one month, or one day, to support the address. He de-

clared in plain terms, that if they did not choose to make him Lord Chief Justice, he was determined to resign the office of Attorney-General, and that they must fight their own battles in the House of Commons, as he never again would enter that assembly. This spirited conduct had its proper effect; he was made Chief Justice and a Peer, by the title of Baron Mansfield. On the day when he took his seat in the Court of King's Bench, the Duke of Newcastle, not daring to face parliament, resigned." Vol. v. pp. 136, 137.

These extracts will have fully established Lord Campbell's reputation as an agreeable and entertaining writer. There are some few smaller anecdotes and remarks, which we gladly take to relieve the dulness of our own pages. Many of these occur unexpectedly, and we have noted them without any regard to order.

Serjeant Maynard.—"Being destined to the legal profession, he was removed to the Middle Temple, where, luckily, he found a set of hard-reading men, including Noy, Selden, and Rolle. Now he acquired the taste for black-letter law, which stuck by him through life, and made him prefer the Year-books to Shakspeare or Ben Jonson, insomuch that, when he grew rich and kept his coach, he never took an airing in it without having a volume of these Reports as a companion; and he solaced his old age by publishing an edition of them." Vol. iv. p. 4.

"He (Maynard) had amassed an immense fortune from his professional gains. On one Western Circuit, in the year 1647, he received in fees 700*L.*, the largest sum heretofore made on one circuit by any barrister; but with the prosperous times which followed, his profits must have been still more considerable. Alas! however, although Lord Coke says that, by the special blessing of Heaven on the law, lawyers rarely die childless or intestate, Maynard left behind him no posterity from any of his three marriages, and his riches were distributed among collateral relations of whom he knew nothing. For the mere pleasure of what he considered a clever legal trick (or *trickum in lege*), he is said to have rendered nugatory the settlement made on his marriage with his third wife." Vol. iv. p. 36.

Mr. Tidd.—"I delight to think that my special-pleading father, now turned of eighty, is still alive, and in the full enjoyment of his faculties. He lived to see four sons sitting together in the House of Lords—Lord Lyndhurst, Lord Denman, Lord Cottenham, and

Lord Campbell. To the unspeakable advantage of having been three years his pupil, I chiefly ascribe my success at the bar. I have great pride in recording, that when, at the end of my first year, he discovered that it would not be quite convenient for me to give him a second fee of one hundred guineas, he not only refused to take a second, but insisted on returning me the first. Of all the lawyers I have ever known, he has the finest analytical head; and if he had devoted himself to science, I am sure that he would have earned great fame as a discoverer. His disposition and his manners have made him universally beloved." Vol. iv. p. 484. note *.

This is equally honourable to both parties. Lord Campbell continues the professional pedigree, by claiming as his own pupil Mr. Dundas, the present Solicitor-General.

Lord Campbell thus speaks of the House of Lords:—

"It is a curious fact, that, with regard to law reform, the two Houses have recently changed characters. I will not presume to praise the assembly to which I have now the honour to belong, as far as politics may be concerned; but in jurisprudential legislation, I say boldly, they are greatly in advance of the other House, which has become the great obstacle to improvement."

So far so well; but his Lordship has afterwards a word on the other side.

"In his (Lord Hardwicke's) time a meeting of the Peers had somewhat the air of a deliberative assembly, instead of being a lounging-place to hear the news of the day before dressing for dinner." Vol. v. p. 50.

Nor has he too high an opinion of lawyers of any class.

"It is whimsical enough that Johnson himself for a moment wished that, instead of being at the head of English literature, he had been a 'law lord.' But at other times he showed a consciousness of his own superiority to Chancellors and Peers. 'It is wonderful, sir, with how little real superiority of mind men can make an eminent figure in public life.' Hardwicke is to Johnson as the most interesting life that could be written of Hardwicke is to Boswell's 'Life of Johnson'—the proportion of a farthing candle to the meridian sun." Vol. v. p. 167. note *.

"Once, in a conversation I had with a very eminent counsel at the Chancery bar, who wore a silk gown, respecting the effect of 'notice to a purchaser of an unregistered deed,' I opposed his opi-

nion by citing a decision in point of Chancellor d'Agesseau. 'Ah!' said he, gravely, 'but had the French Lord Chancellor called in the assistance of the French Master of the Rolls?' Vol. v. p. 168.

Thus speaks his Lordship in praise of port:—

"With what delight would he (Lord Northington) have perused the panegyric upon his favourite beverage, to be found in a late article in the 'Quarterly Review,' on the two celebrated brothers, 'Lords Stowell and Eldon.' 'He and Lord Eldon perfectly agreed in one great taste — if a noble thirst should be called by so finical a name — an attachment to port wine, strong almost as that to Constitution and Crown; and, indeed, a modification of the same sentiment. It is the proper beverage of a great lawyer — that, by the strength of which Blackstone wrote his Commentaries, and Sir William Grant modulated his judgments, and Lord Eldon repaired the ravages of study, and withstood the shocks of party and of time.' May I add — 'that, by which Serjeant Talfourd was enabled to prepare a great argument for the Court of Common Pleas, and was inspired to write the immortal tragedy of Ion?' From the fervid eloquence and poetical exaggeration of the passage, he, I suspect it is, who adds: 'This sustaining tranquillising power is the true cement of various labours, and prompter of great thoughts.' — Q. R. No. cxlix. p. 52.; Vol. v. p. 177.

But there is one drawback: —

"Roderic (a cousin of Commissioner Trevor) was returning rather elevated from his club one night, and ran against the pump in Chancery Lane. Conceiving somebody had struck him, he drew and made a lunge at the pump. The sword entered the spout, and the pump, being crazy, fell down. Roderic concluded he had killed his man, left his sword in the pump, and retreated to his old friend's house at the Rolls. There he was concealed by the servants for the night. In the morning his Honor, having heard the story, came himself to deliver him from his consternation and confinement in the coal-hole." — Vol. iv. p. 60.

We must now take leave of these volumes. Besides their professed contents, they contain the experience of a long life passed in an active profession, and in the various stages of a barrister's successful professional career. We think it a fortunate circumstance that Lord Campbell manfully resolved

to apply the leisure which was given him to the preparation of this work, and that so far he has been enabled to accomplish what he proposed. Its success will stimulate others to explore other parts of our legal biography and antiquities, and to dig deep in a mine of great richness and the most varied contents.

ART. VI.—REGISTRATION OF DEEDS IN THE
STATE OF NEW YORK.¹

ALTHOUGH this paper will be confined to the system of registering, or, as it is there termed, of recording, instruments affecting the title to real estate, adopted in the State of New York, yet the same principles prevail in all the states, composing the confederacy of the United States. But while the same principles have been introduced in all, between some there is a great variance in the details of their application. It would, therefore, have been erroneous to employ the term United States in the title of this essay.

In treating on this subject, we have to consider : —

First, What constitutes a register of the instruments in question.

Second, The instruments entitled to be registered.

Third, How they become so entitled.

Fourth, The legal effect of registration.

Before formally discussing these, however, it is proper to explain that the state is divided into counties, and that each county has a clerk, elected by the people, commissioned by the executive, and qualified by taking the oath of office prescribed by law, and giving bond with approved sureties, for the faithful performance of his duties. In all the coun-

¹ Read at a Meeting of the Society for "Promoting the Amendment of the Law," on Jan. 6. 1847, communicated by E. R. Boyle, Esq., Counsellor at Law of the State of New York.

ties, except that of New York, which has a Registrar of Deeds, elected, commissioned and qualified in like manner, this clerk is, by virtue of his office, the recording officer of the county. These officers have charge of the books containing the records, which are required, by law, to be kept open at all reasonable hours, for public inspection, and may be examined without paying either fee or reward.

In addition to these officers, there is, in each county, a Surrogate, or, more properly, a Judge of Probate, who is empowered to grant letters testamentary and of administration. Before him all wills must be proved, and in his office recorded, as must also be all letters of administration. The Surrogate has other powers besides these, but, being foreign to the subject, no further reference to them is necessary.

Here we return to the first branch of the subject, and inquire what constitutes the register of an instrument affecting the title to real estate?

This question, involving the mere definition of a term, may be thus answered:—Filing it in the office of the Clerk, Register, or Surrogate of the county in which the lands affected by the instrument are situated, as the case may require. The registration, for all legal purposes, is then completed.

On receiving the paper (parchment being seldom, or never used) it is the duty of the officer, first, to note the day, hour, and minute, with the greatest possible exactness, in which it was placed in his hands, next to index it, and lastly, transcribe it *verbatim et literatim*, in the volume of records, adding a certificate, stating the time of receipt, and at whose request registered. This done, on paying the fees, the party leaving the instrument is entitled to have it. The fees are fixed by law at six cents, or about threepence sterling, for every hundred words that the document contains.

For greater clearness it may be observed, that the instrument must be registered in the county where the property lies. Thus, if lands in several counties be affected, the instrument must be registered in each county. So also, must wills, and letters of administration be placed on the records

of the county where the deceased had lands, otherwise lands are not affected. Thus the first branch of the subject is disposed of.

Second, As to the instruments entitled to be recorded.

By the statutes of the state it is provided that all deeds or other instruments of writing, conveying or creating an interest in, for a longer time than one year, or otherwise charging, real estate, to be valid against subsequent purchasers or mortgagees for a valuable consideration without notice, or judgment creditors, must be recorded in the county where the same is situated, and only then from the time when the instrument shall be recorded. It is also provided that no agreement, bargain, or sale, in anywise concerning real estate creating an interest for a longer term than one year, shall be recognised by any court of law or equity, unless the same be in writing under seal; and, when the estate created be less than freehold, executed in the presence of at least one subscribing witness: if freehold, then in the presence of at least two subscribing witnesses. Thus, even a lease for a term exceeding one year, to have any legal validity, except between the parties, must be registered, and to have any force at all must be in writing under seal, and executed in the presence of at least one subscribing witness.

And further under this head, by the laws of every state, all judgments at law, and decrees in equity, from the time of their rendition become liens on the real estate of the judgment debtor, on filing a transcript of, or indexing them as it is termed in England, in the county where the estate lies. This is a very simple process, attended with little trouble, and trifling expense. The lien thus created continues twenty years, and unless satisfied may even then be revived by *scire facias*.

Here we must diverge a moment, to refer to the peculiar organisation of the Republic, as regards the administration of justice. There are, in fact, two judicial systems, each independent of, and differing from the other. One confined to the limits of each state, created by the state, deriving its powers from it, and having no power, except under local laws. The other has jurisdiction, both legal and equitable

throughout the whole of the United States, but only over questions arising under the federal laws and constitution. This great court holds sittings in each state, and is termed the Supreme Court of the United States.

The peculiar features of these systems need not further be explained. It is enough that they exist, and that sufficient has been said to render intelligible the statement, that a judgment or decree, rendered in the federal court, binds the real estate of the judgment debtor throughout the state in which it may have been pronounced, even although it may not be indexed in the county where the lands are situated.

In connection with this division is the law regulating the right of dower which a wife acquires in the lands of the husband, and the manner in which that right may be alienated. This law is very nearly similar to the old law of England on the same subject, except that the conveyance executed by the wife must be registered, and appended to her deed must be the certificate of some officer authorised to make the same, that he examined her separately and apart from her husband, and she declared that she executed the instrument with full knowledge of its contents, and without fear or duress. This certificate must also be registered, otherwise a renunciation of dower by the wife is no bar, not even against herself, should she become a widow. This closes the discussion of the second branch of the subject.

Third, As to how an instrument becomes entitled to be registered.

To entitle the instruments described under the last head to be registered, if executed in the State of New York, one of the subscribing witnesses must appear before some judge or justice of a court of record, either federal or local; justice of the peace, mayor, recorder, or other chief magistrate of a city or incorporated town, or commissioner of deeds; and make oath that he saw the grantor subscribe his name thereto; that he subscribed his name as a witness thereto; and that he heard the grantor declare that he knew the contents thereof, and that he executed the same for the purposes therein mentioned. This is what is technically termed proving the instrument, and of this proof the proving

officer must append his certificate. Without this no registration has any validity.

If the instrument be executed out of the state, but in one of the United States, it must be proved before some judge or justice of a federal or local court of record having a seal and a clerk, chief magistrate of a city or incorporated town having a seal and a clerk, or commissioner appointed by the State of New York to take acknowledgment of deeds in the state where the instrument is executed. But if proved before any of the officers above-mentioned, except the last in addition to the certificate before described, the clerk of the court, city, or town, as the case may happen, must also grant his certificate, under his official seal, that the officer before whom the proof is made is well known to him, and is the judge, justice, or chief magistrate described, and that the signature is genuine. This certificate also forms part of the record, otherwise it is of no effect or force whatever, except between the parties. Indeed, unless there be such certificate, the clerk or register cannot legally receive the instrument.

Lastly, If the instrument be executed out of the United States, then it must be proved before the minister plenipotentiary or other officer representing the United States at the the court, or United States' consul, or chief justice of some court of record having a seal and clerk, mayor, or chief magistrate of a city or incorporated town having a seal and clerk, in the country where it may be executed. If before the minister or a consul, the certificate must be granted under his official seal; but if before an officer of the foreign country, in addition to his certificate and that of the clerk, there must be appended a further certificate under seal, by a secretary of state, or other officer of equal dignity and authority whose duties are similar, that the seal of such court, city, or town is genuine, and that the person named as such, is, or was the chief justice or magistrate described at the date set forth.

Having described the forms and solemnities necessary to be observed in order to entitle the instruments under discussion to be registered, and which in legal parlance is termed the authentication of conveyances, it only remains, in treating on this branch of the subject, to explain the duties of the

commissioners of deeds. These are simply officers commissioned by the executive to administer oaths and take proofs of the execution of conveyances. These are their only powers. From this point we pass to the last division of this essay.

Fourth, The legal effect of registration.

If, in addition to recurring to the first sentence under the second head of this discourse, it be remarked that the recording of a deed is held to be notice to all the world, in strictness this branch is disposed of. But, it must not be lost sight of, that the proper authentication and recording of an instrument are two of the principal incidents attached to it. Either of these being neglected, is fatal as to barring creditors' mortgagees and subsequent purchasers, without notice; and this notice, if given, must be such as cannot fail to make the party absolutely convinced that there are claims superior to those he may be about to acquire. Mere report, or that which should put a prudent man on his guard, is not sufficient: it must be something special. But no notice can bar a judgment creditor, and this renders it absolutely essential that every such instrument as has been described should be recorded. With this our account properly closes, but there are several other peculiarities attached to the manner in which lands may be alienated or acquired, that are worthy to be described. Of these it is now proposed to treat.

On granting letters of administration on the estate of a deceased person, all his effects, of whatsoever nature, kind, or description, they may be, whether real or personal, become vested in the administrator; but, as affecting lands, in order to sell, or otherwise safely dispose of them, a special order for that purpose must be first obtained from the Surrogate of the county in which the lands are situated. Here, too, is a proper place to repeat, that neither letters testamentary, nor of administration, are binding on the real estate of the deceased person beyond the limits of the county in which they may be originally granted; until, in the one case, the will, with a certificate of its probate, and in the other, the letters of administration, shall be registered in the office of the Sur-

rogate of the county in which any other lands of which the deceased died possessed may be. Thus, if the deceased had lands in several counties, the will, or letters of administration, must be registered in each county, otherwise the real property is not affected as to any county in which there has been no registration.

All the foregoing only applies to the alienation of lands by the voluntary act of the owner, or his decease; but they may be alienated involuntarily by the operation of law. Of this involuntary alienation, it may be said that the real estate of a judgment debtor may be sold under a common law execution or decree in equity, on the failure of a sufficiency of goods and chattels to meet the plaintiff's demand. To effect this sale of the debtor's interest that appeared of record at the time of pronouncing the judgment or decree, it is only necessary to advertise it, describing the lands by metes and bounds, at least six weeks before the day of sale, either by affixing notices in three public places of the county where the lands are situated, or inserting an advertisement in some newspaper published in such county. It is also provided by law that the sale shall take place in front of the Court House. Of course, in the proceeds of such sale a senior judgment creditor has precedence.

It only remains to advert to the process adopted to ascertain the validity of title. For this end, if it have come down through a series of purchasers, it is only necessary to examine the records in the county clerk's office. If by devise or inheritance, then the surrogate's office. In one or both of these, a perfect history, for all legal purposes, of title must be found. It is only by searching in these offices that a correct abstract can be made. As to liens created by judgment, they too are to be found in the office of the county clerk, unless the judgment was rendered in the federal court, then in the office of its clerk.

It must be confessed that, in making this search, much care, and in some few instances patience, are necessary; but still, such is the simplicity and perfect organisation of this system, that mistakes seldom or never occur; and it must indeed be an intricate title that would occupy a person

skilled in that branch of practice, more than a few hours to trace it back to the first settlement of the country, or rather introduction of records. In short, so easy is it to make every requisite examination, that the most respectable solicitors rarely find it necessary to charge more than fifty dollars, or about ten pounds sterling, for both drawing and engrossing the conveyance, and doing all other labour, including searching and the abstract incident to the transfer of the title to real estate.

Notwithstanding this great simplicity, however, such are the contingencies incident to the sale of lands, even under this system, that questions requiring the advice of counsel daily arise. And although American legislators seemed to have aimed at that end, they have as yet failed to discover a plan by which real property can be transferred from owner to owner, with as little ceremony as the right to a bale of cotton can be changed from seller to buyer. Perhaps it is well that such a discovery has not been made. This much, however, must be said in favour of this system. Actions of ejectment are comparatively very rare, and still more rarely terminate in favour of the plaintiff. When they do so, it almost invariably appears that the defendant has been guilty of gross negligence. Most probably he never caused the records to be examined at all, which is sometimes the case.

ART. VII.—THE PERIODICAL PRESS.—THE RAILWAY BOARD.

It is impossible for a work like ours, which is both periodical and on a contemporary subject, to avoid constantly feeling the importance of the Press as a great instrument for the diffusion both of knowledge generally and permanently useful, and of information bearing upon the events of the day. The Periodical Press accordingly, which has become so great an engine for political purposes, is as powerful an instrument for those connected with legal improvement and with all that concerns not merely the making but the execution of our laws and the distribution of justice. Let us for a moment pause upon the position and the merits, the rights and the

duties, the wrongs and the faults of the very important and useful class of men in whose hands this power is lodged. We are now rather to speak of the Newspaper Press than the monthly and quarterly productions which are devoted to criticism and to political disquisitions, because the circumstances in which the latter are placed, differ very materially from those of the former. A different class of writers is usually engaged; fuller means of preparation are afforded; more care to avoid error may accordingly be fairly expected; and one class, at least, of subjects is excluded, the record of passing events, whether parliamentary, or judicial, or the events of the day.

It would be wholly superfluous to dwell on the power exercised by the newspapers. Let a man, said Mr. Burke, tell me his story every day for a year, and that man is my master. Nothing can control him or limit his influence, but the notice which we have of his being connected with a particular party, and thus biassed in both the opinions he delivers and the statements of facts he makes, and the further circumstance that he has many competitors for our favour or our assent, who attack him as he assails them. The object of a modern tyrant accordingly, would be, not to wish that the people had a single head connected by one neck with the whole body, in order that he might strike it off and annihilate all opposition to his will, but to desire that the press had a single pen, and to make it the organ of his wishes and the tool of his power. Could he silence all competitors and alone address the reading classes, alone state his opinions, tell his stories, assail his enemies, support and comfort his adherents, assuredly he would reign absolute, how enlightened soever his people might have become. Such was Napoleon's plan in France; and when languishing in his prison at St. Helena, he avowed that no modern monarchy could be carried on without the Press; but he affected to hold that a free press—a press at least free to a certain degree—was become indispensable, and he affirmed that had he triumphed at Waterloo, it was his design both to reign in peace with his neighbours, and to govern at home with a liberal allowance of freedom to the press. We fully believe that he thought so at the time he

spoke in what has been termed sometimes the easy and sometimes the impossible tense—the preter-pluperfect subjunctive—easy to use, impossible to deny or affirm. But we equally believe that victory would have brought in her train new ambitious schemes and new despotic desires, and that it was well both for peace and freedom that his star set on that great day.

But without obtaining undivided sway, rulers and public leaders and the friends of various lines of policy may obtain influence quite sufficient for all worthy purposes; and the competition which exists, the exclusion of all monopoly in the article of discussion and news, makes a power comparatively harmless, which might otherwise become exceedingly mischievous. This safeguard of truth and of the government as by law established, has always been overlooked by those whose alarm the power of the periodical press excited. Mr. Burke denounced it as the general enemy. Mr. Windham complained that it had become a power in Europe. Others have called it a fourth estate in this country; and the legal joke (we believe of judicial origin),—"Our Lord the King of the Press," has long been current in Westminster Hall.¹ Whoever they be that thus express these apprehensions, forget in the first place, that the Press must follow in order to lead, conforming itself to the public feeling if it would influence that feeling, and going, like all political leaders in a free state, two steps with their party to make their party take three with them. And they equally forget in the second place, that though there is action and reaction, the press acting on the public mind, while it takes much of its colour from thence, yet the unrestrained freedom of publicity on all sides of all questions, and of attacking all periodical writers who would beguile the people or dictate to them, imposes limits to this influence over the public mind. We must, however, dwell somewhat more at length on this topic, and show that a certain portion of evil is occasioned by the dissemination of error notwithstanding the competition and the freedom we are describing.

¹ The legal reader needs not be informed that the technical name for the King in the Common Pleas is "Our Lord the King of the Bench."

There are certain topics which all the papers or nearly all seem agreed to avoid, and certain persons whom all regard as sacred. If the faults of the press, whether of omission or commission — the faults common to all newspapers — come in question, there seems a general determination to suppress all discussion on the subject. Here all make common cause. Here is ground on which all conductors of papers, Whig, Tory, ultra, moderate, radical, all are agreed. Here is a plain and constantly subsisting combination. But what signifies it, say they, that we should denounce faults which every one must be aware of, and which none of us can deny, though we may palliate or excuse? Do not all the world know that we print at a moment's notice, and once a day? How can we then be always accurate in our facts, or just in our comments? True; but when a case of hardship does occur, when any individual has been most unjustly dealt with, or a dangerous error extensively propagated — then is the occasion for making ample reparation, and this the press, very generally speaking, avoids doing. Instead of at once retracting and casting itself upon the mercy of the public, by reminding it of the extenuating circumstance — the hard necessities of daily publications — little reparation is made — no shame or even sorrow is for the most part expressed — and too often the thrice-refuted calumny is repeated, unless where recourse has been had to the law.

This aid given to the press to slander is not its own fault altogether. If it prints slander of itself, it is sufficiently amenable to the law. Of that no one can doubt. But its irresponsible publication of Police proceedings comes under another head, and for this the City Magistrates and the Legislature are deeply responsible. It used to be the practice of all the magistrates to receive such *exparte* statements as any one having a spite against any neighbour chose to make in that neighbour's absence, all which statements were published in 300 newspapers, and went all the country over. But fourteen or fifteen years ago they were warned by the Government to desist, on pain of being struck out of the commission, and losing their places. The remedy was effectual. But the justices in London are corporation officers,

and irremovable. They continue from mere vulgar vanity and love of an altogether unjust and illegal authority, to sit daily hearing persons who, on pretence of asking a warrant or a summons, or under the still more ridiculous colour of what is called "asking advice of the sitting magistrate," which they have no more right to ask than to ask of any private person, and he has no more capacity to give than if asked his advice on a fracture or a fever — and hearing these applicants on their whole, real, or fancied grievances against parties who were never summoned, and know absolutely nothing whatever of the cruel farce going on. That this should have so long been tolerated seems hardly to be believed. That it should be suffered much longer is wholly impossible. But while it lasts, its chief mischief proceeds from the press. The newspaper propagates the story the telling of which the magistrate's gossiping propensity, or his love of slander, or his more silly vanity occasions.

On another point on which all the press make common cause, this is more justifiable. If any attempt is made against one of their number individually, all are with him. If any one is assailed under his own name, all join in holding as accursed whoever would tear away the veil that protects their secrecy — all join their hands in holding down the cloak which any one would try to remove. Their unknown position, their inviolable secrecy seems deemed to be necessary to the proceedings of this invisible tribunal. Here we have no one now to check or expose them, be their delinquencies ever so great. Cobbett used to be a constant watch over them, and their almost indiscriminate assailant. He named them freely as he avowed his own name, and undoubtedly he was of some service in restraining their licence.

Nothing can be more injurious to themselves than this love of concealment. It is as ill-judged as any course of conduct can possibly be. What could they lose by being known? What but the being prevented every now and then from saying what they never should wish to say? What could they suffer but a constant or prescribed restraint under which every rational man should desire to be placed? And observe the prodigious benefit which they thus would gain by their being known. They would rise incalcula-

bly in the estimation of their fellow-citizens, they would occupy a much higher place in society. They do not occupy any thing like the place to which they are justly entitled—entitled by their talents, by their accomplishments, by their solid acquirements, by their great importance. Their office is of the greatest public benefit; there is no profession more useful than theirs; nay, it has become absolutely indispensable; there is no department of the Government more essential to the administration of public affairs; there is no portion of the legislature that can be with more inconvenience, or even danger, given up.

Consider how great are the functions which they perform, and then say is it fit, is it becoming, is it safe, that such men should not be properly received in society? The most ignorant, the most empty, the most shallow creature who can support himself on a small income and a great credit with the tradesmen, assumes to himself this right. The most vulgar and narrow-minded merchant or banker, the most half-bred barrister, the most obtuse-headed country gentleman is sure to have all doors in London open to him and his. The veriest simpleton that can call himself Lieutenant or Captain, with hardly more to live upon than his pay, enters into every fashionable party. We are far from thinking that all such parties would suit the better taste of *the gentlemen of the Press*, taking Mr. and Mrs. Bull and the Misses Bull by the horns (we at once adopt a name which we know accurately describes those we speak of). But at least they should have the option—they should be excluded by their purer taste, not by an absurd and misplaced feeling of aristocratic pride, self-sufficiency, and groundless presumption. They would love to frequent the better and more rational circles of the political and the high-bred patricians, the Members of the Bar, the Church, the two Houses of Parliament. They are formed to add new enjoyment and give additional ornament in those circles. They are able, learned, and respectable men; and the only reason which can be urged against their free admission into society, is their anonymous vocation. It is not so in Paris, where they are openly avowed and publicly known, and are members of the legislature, like lawyers and

other literary men. It would not long continue to be so here, were their connections with their different works avowed.¹ If it be said that they would be still more dreaded, because no one could be safe in speaking before them for fear of publicity being given to their words—let such apprehensions at once cease before the plain consideration, that the good sense of the gentlemen themselves would immediately prevent all such breaches of social confidence, and before the known fact that no such inconvenience has ever been felt in Paris. There are in that capital of course, as there are here, vile creatures, the disgrace of their calling, whose papers disgust all that hear them named. These never are seen; their existence is unknown; to receive their papers would be discreditable, their visits impossible. But there never is any complaint made of the respectable editors, or their fellow-labourers, received everywhere as they are in the circles of the metropolis.

Let us, in stating this part of the subject, ask what gentleman of education, however liberal, of habits however patrician, would need to be ashamed if in society he heard his authorship suspected of a clever *jeu d'esprit*, or a powerful declamation, or a learned argument, which had appeared in any paper? What reason would he have, unless from some accidental circumstance, against openly avowing it?

We have no fear that any one will charge us with leaning too much towards the periodical press in these reflections. We have shown no indisposition to remonstrate with them when their conduct seemed to deserve reprobation, or at least to require warning or comment. But we are bound to render them justice where their merits make it our duty to commend them, and to state our estimate of them freely where we think them undervalued. The truth is, that the dislike felt by so many

¹ The practice of avowed connection with newspapers is fast gaining ground. In some papers it is perfectly well known that such and such gentlemen are their Editors. Our observations cannot, therefore, apply to them. Our earnest wish is to extend this practice not only to the Editors, but to the Reporters, who pursue a vocation highly honourable in itself, and only to be rendered not so if it be ill performed. It is also quite true that many connected with the Press voluntarily decline going into society, lest such intercourse should hamper them. — Ed.

to the newspapers is not for their party violence, or even their personal attacks; it is rather for their insolence. A person aspiring to the regal number of *We*, and issuing his commands, or even deigning to give his counsels, from the clouds in which he sits, excites sometimes ridicule, sometimes irritation, according as the reader may be in one humour or another. But if the individual were known, he would stand on the same ground with all his fellow-citizens; he would less frequently offend by such presumption as is now complained of; and his opinions, with his arguments, would be rated at their just value.

It is not, however, to be assumed, that we regard the authorship of any particular article in a paper, as necessary to be disclosed at the time the paper is published. There are many objections to this, and the ill-success which attended Mr. Cumberland's experiment of the "London Review," where each criticism was signed by the writer's name, would prove our objections well grounded if any such proof were wanting. All that we contend for is, the avowal of a known editor, amenable not merely to the law, but to society, and the disclosure of as many of his coadjutors as feel no particular objection to their names being known. In a word, we would have the newspapers placed on the same footing with the Edinburgh and Quarterly Reviews. It is known to all the world that certain gentlemen are generally engaged in writing the different papers in those celebrated works. Who may have written each is not so well known; but a body exists morally as well as legally responsible, and that is enough for all social purposes.

It is certainly for the interest of all mankind to discourage, as far as may be, anonymous writing. There may exist many reasons why it should not wholly cease, and these have been well stated in some of the earlier numbers of Mr. Addison's "Spectator" by himself and Sir R. Steele.¹ But the lean-

¹ The "Spectator" is a remarkable instance of the advantages arising from the publicity of the authorship of articles in a newspaper. It was soon known that Addison, Steele, Tickell, and Budgell were the contributors to the "Tatler" and "Spectator." These publications, it is to be remembered, had, beside the essays and criticisms now preserved, articles of news and advertisements. They were, in fact, the first newspapers which greatly influenced public opinion.

ing should be in favour of men's writings — above all, their controversial writings, and most of all, their attacks upon individuals — being prepared under the responsibility resulting from a feeling that their names are known, and should be given to all the world under the sanction of their names. It was proposed by Lord Brougham that, to encourage this disclosure, those persons only should be allowed to give in evidence the truth of the matters for which they were sued or prosecuted, who could satisfy the Court that they were the real authors of the alleged libel. As his Lordship's bill of 1816, for enabling the truth to be given in evidence in prosecutions, has been in part enacted two sessions ago into a law, he may, perhaps, be encouraged to confer this additional benefit on the press and on society.

There is no portion of the newspapers, we may in conclusion add, so unsatisfactorily conducted until of late years, as the reports of Law Proceedings. Formerly such reports were wholly useless, or otherwise they only gave misinformation. This was no fault of the Reporters, because no one but a lawyer can correctly report on legal matters. Of late years this defect has been in a great measure supplied by the employment of barristers, or well informed law students. It is to be hoped that a still more ample use will be made of this great and very material resource, so easily at the command of the press. We have ever done our utmost to encourage it, and to resist the absurd prejudices so unworthy of their origin, which, through want of reflection, some professional men raised against the practice.

We are glad to find that we receive the general assistance of the Press on one subject which we have brought prominently before our readers.

Our readers may probably be as tired of this endless sub-

But we find that the known authors of the best articles, were not only courted by ministers, but became ministers themselves. Steele and Addison were in Parliament and in Government; and the latter, after having filled many important offices, at last became Secretary for Ireland, and afterwards Secretary of State. — *ED.*

ject as we are ourselves, and yet they must submit to have its discussion renewed again and again, as we submit to the labour of renewing it. There is but one term to our annoyances and weariness, and that is the success of our endeavours. We have been partially successful. We have, with the assistance we have received, gained a good deal for the country and for the cause of sound principles in this most important matter. We have had our share, supported by many enlightened members of both Houses, in putting down the very worst department ever formed to do public business, the famous Railway Board. We have helped to drive the legislature upon a better system, by many degrees, than the one which was put down. But much more remains to be done than has as yet been accomplished, and we must only gather courage and confidence from the very partial success that has yet attended our exertions, and by no means let it satisfy us or lull us into inaction as if the day were won.

What can possibly justify our lawgivers in persisting in the attempt to transact business, which they not only in point of fact are incapable of doing even tolerably well, but which it is utterly impossible that they should do otherwise than as ill as may be? If there be any one thing which the House of Commons is less fit for than all other things, it is inquiries of a judicial or quasi-judicial nature. How shall men act like judges who are open, of necessity, to canvass of parties, forced by the very tenure of their political existence to receive individuals, and hear them in matters which they are to decide — receive them privately, and listen to one behind the other's back? But this is very far from being all of it, or even the worst of it. The same men are unable to decide justly. It is as much as their seats are worth. We say not that any outrageous vote will be given against all justice, and in the face of all reason, and in the teeth of all proof, by members in favour of their constituents. But we do affirm that there are in each case scores of minor points — interlocutory matters which hourly arise — on these the bias will be strong, and by deciding these in one party's favour, the ultimate judgment on the whole matter will, in very many cases, be materially affected — in some altogether determined.

It may be said that members need not fear their constituents if they justly, firmly, and manfully, do their duty. Possibly it ought to be so; we only know that it is not so; and while human nature remains the same, while voters are voters and members are members, it never will be so. No one needs dread being charged at the hustings with turning a deaf ear to the solicitations of his supporters. That clumsy method is purposely never resorted to, at least in English contests. But every one knows the difference between a zealous and a lukewarm support; every one knows the effect of a general feeling how much the bill owed to Mr. such a one — how kindly he received the deputation — how anxiously he gave them all the help he conscientiously could. "Far be it from us, who waited upon our worthy member, to say that he would on any account whatever have decided against his convictions. But we must say his reception of us was most gratifying, and that to his fair and just exertions we owed our success."

Then it is said that the late regulations of the Lower House prevent any one from sitting on a bill in which his county or borough are interested. Also peers under the New Orders cannot sit in committee on bills where they are personally interested. What is the consequence? You sit on my county's bill, and I sit on yours — or, if we are peers, you help me in the Kent Railway, and I help you in the Wilts. Thus the matter is arranged, the accounts are adjusted, and — the Standing Orders remaining in full force, are wholly evaded, and become utterly impotent.

But is it, or not, true that some peer or other is known to have received shares for his work and labour? A noble duke repeatedly has in his place thrown out such a charge. Again, is it, or not, true that the members from one portion of the United Kingdom at one time attended committees so as to excite universal wonder? We would fain see a searching inquiry like that instituted some sessions ago by Mr. Roebuck into this far more heavy charge against the purity of Parliament and the common honesty of its members, than any thing connected with the mode of obtaining seats, though that kind of corruption is sufficiently important.

The suspicion under which the two Houses labour may be groundless; and it may, having some foundation, be exaggerated. That it exists is out of all question, and surely that is sufficient reason for taking some steps that may be effectual to remove it. How often must we say the course of justice should be not only pure, but unsuspected? As often as we find an attempt made, and, for the present, successfully made, to exclude this maxim from the very place where it should most prevail, and make an exception for its application to the very proceedings which it most naturally should govern — the supreme legislature of the state, and the great business of making the laws and dealing with the rights of the realm.

Observe how the House of Commons itself acted when the spirit of party interfered with the decision of a right to sit there. There was an abandonment of the claim, even till 1770 held most sacred by the House, to decide on all elections; and this matter was at once handed over to select committees sworn to try the causes, and also taking evidence on oath. Is property of no moment? Are the rights of vicinage — of common — of way — of chase — are the rights of possessing the houses and lands that we have inherited or have purchased — to be counted as immaterial? And yet these rights are now disposed of as ill, every whit, as even election petitions were before the Grenville Act.

Hitherto we have spoken of purity and corruption only. But were the Commons all Catos and Marvels, unless with the virtues of men they also possessed the wisdom and perspicacity of angels, — unless with native honesty, which no worldly taint had sullied, they also had by intuition the learning of lawyers, which no study or practices had been wanted to bestow, — they could never be the body fitted to dispose of the questions which our present system now brings before their committees every day of every session.

Let us again remind the reader of the very opposite principles which are applied to the ordinary judicial business of the country and the quasi-judicial causes of parliament. In the Courts of Law and Equity not a question can ever come before ignorant men for determination, how insignificant so-

ever the interests which it touches. The most learned and most experienced lawyers, men whose lives have been devoted to the study of jurisprudence and examination of evidence, are alone suffered to deal with the claim to recover twenty guineas, or to obtain possession of a rood of land. The rules to guide their decisions are more or less established; either the statutes, or the dicta of writers, or the determinations of courts, affect the course by which these questions are to be governed. If, in sifting the evidence, a jury goes wrong, the judge corrects their error. If the judge goes astray, the Court sets him right. All is care and scrupulous exactness in excluding the chance of error, whether of fact or of law, when the matter is ever so trivial, and the rule of jurisprudence ever so settled. Not so in parliamentary committees when the most important rights of the subject are in question; not so when masses of property, far larger than any courts usually deal with, are at stake; not so when interests far more severely touching men's feelings, and affecting far more deeply their happiness, than any question of property ever can; and, above all, not so when the rules of decision are unknown, and *ex post facto* legislation is to govern. Then all precautions are abandoned; every laxity is allowed; utter ignorance of all law, all principle, all analogy is constantly suffered to combine with absolute inexperience in business; complete incapacity to sift evidence or to weigh it; fundamental deficiency in every one of the qualities which go to form even a tolerably safe judge. Why it would not be much more absurd to call in the box, and decide by the casting of the die.

Is it possible that this unnatural system can much longer be endured? Endured, indeed, we can hardly say it now is, but borne as a matter of hard necessity. Never is it alluded to that all rational men's voices are not raised against it. In the House of Lords during the two last sessions it was repeatedly condemned by all the statesmen of greatest eminence or influence; nor was any voice raised in its behalf. Even the late Lord Canterbury, long in the chair of the Lower House, and habitually the advocate of its rights as he was officially the champion of its privileges, declared that a

change must be made in the whole machinery of private business, and cited the Grenville Act as a demonstrative proof that the Commons could safely part with the exclusive right to deal with certain public matters, and could consistently take better help than its own body afforded, in passing private bills. Yet, after all these denunciations, and after so general an expression of opinion that a change must be made, to what does the only alteration hitherto made amount? To very little indeed; to hardly more than an admission that the present state of things is bad, and that a better must needs be resorted to.

The late act¹, hurried through both Houses at the very end of a most fatiguing session without any discussion, applies no remedy whatever to the glaring evils of which all men complain. There is a Railway Board of five members, three of whom are paid, five thousand a-year in all, and the chairman and the two other members are eligible to sit in the House of Commons. They are allowed to appoint secretaries and clerks. Their powers are almost entirely left out in the Act, for there being somewhere about 300 railway acts in existence, which confer divers powers on the Board of Trade or the Privy Council, all these powers by a single sentence in section 11, are transferred from the Privy Council to the new Board. To remove without any reference to them whatever, and without citing the acts that conferred them all the powers vested by law in the Privy Council, is surely most inconvenient, although unfortunately there are some recent legislative precedents in its favour. To vest those powers in a new body without naming them, specifying them, referring to them, or even citing the acts which created them, is leaving the public entirely in the dark. It is, besides, perfectly sure to create disputes touching jurisdiction, and to occasion litigation in very many cases. And as no new and corresponding power of appeal is given on any question of jurisdiction, the Board and the Companies must come before the ordinary tribunals, that is, the Court of Chancery and the Court of Queen's Bench. We have then a Board whose powers can only be discovered by examining hundreds of

¹ 9 & 10 Vict. c. 105.

local acts, and those powers may vary in each one of hundreds of localities.

But this is not all. We have no effectual power of helping or of constraining either House of Parliament in this great concern. The whole evils so loudly, nor more loudly than justly, complained of, remain in full and primary operation, and all that this new Board can do is to examine plans and drafts. So we read this act.

The tenth section, indeed, seems at first sight to give the Board larger powers, by stating in the beginning that the Board may examine and report on any matter referred by the Crown or either House of Parliament. But then follow in the residue of the section, four heads on which they are required to report — and these are only respecting the confirming or completing plans proposed, and not upon the merits of any scheme. Indeed, as the Board is wholly without powers of obtaining or examining evidence, it is as well that no such enactment as should give them authority to report is in the act. For we cannot believe that telling them to inquire and report on a local inspection “or otherwise,” extends to give them all powers of judicial examination and decision by force of the word *otherwise*.

We must also point to the ninth section, as giving another instance of slovenly penmanship (we cannot call it style):—

If any Railway Company is found exceeding its powers, or in any way acting contrary to the acts creating them, or to any general acts, then the Board is — we crave pardon — we are doing injustice to the learned and nimble-fingered draftsman — then “it shall be the duty of the said Commissioners to prevent such unlawful proceeding by the exercise of any powers now vested in the Lords of the Board of Trade.” Not by mandamus — not by injunction — not by action — not by prosecution, but by the “powers of the Board of Trade.” Which powers exist not, unless in particular cases by particular uncited sections of unnamed acts, which powers are not known unless by consulting the sections, and which powers are only given in the particular matters, and in none other. The words of this extraordinary section, however, give the Board the powers to act in the case of Railway A. under

the powers given to the Privy Council in Railway Bills, and only in Railway Bills. For assuredly the words extend to the Board in every case what is authorized by the local act in any one case: and as the Board is required—not authorized, but commanded—to exercise these powers, how can it avoid being answerable for refusing to exercise powers which may be wholly inconsistent with each other? The Board will thus be called upon by the party aggrieved to exercise certain powers: but the Board will find that it is compelled to exercise certain other and incompatible powers, and thus we have the Honourable the Board landed in the Court of Queen's Bench by mandamus to act, or in the Court of Quarter Sessions by indictment for disobeying an Act of Parliament, which Act, it will be the Board's defence, is wholly incapable of a rational construction either by themselves or any Court or any Board under the sun.

It deserves the most careful consideration whether the only remedy, the only measure wearing the semblance of a remedy, for the enormous evil complained of, is not the creating a tribunal of impartial men—not adherents of a minister or of a party, not men sitting in Parliament and subject to all the influence of party, of intrigue, of canvass,—not removable at the nod of a government,—but men separated, like the Judges of the land, from all professional and placed above all political influences, and who, like the Judges, are both pure in fact and unsuspected in public opinion,—who, therefore, will command the respect both of Parliament and of the country. Let this judicial body examine each contested case not of Railway only, but of all private bills, and having examined and tried the questions raised on it between the parties, let it report to Parliament. Parliament will pay such respect to its decisions, that appeals and re-examination will be extremely rare; and thus, without at all abandoning its privileges or losing its control, each House will be able to perform its legislative functions with public benefit, and to the public contentment.

There is a possibility that some one may object to this plan its excluding the examination of projects not contested—their examination with a view to the public good. If any should deem this a defect, nothing can be easier than to re-

move it, by giving the power to either House or to the Crown, of calling for an opinion upon such points. But perhaps it may be thought that these are rather fit subjects for the consideration of the Government and the Legislature than for any judicial or quasi-judicial tribunal, whose proper office is to dispose of contested matters between interested parties.¹

ART. VIII. PHILLIMORE ON LAW REFORM.

Letter to the Lord Chancellor on the Reform of the Law. By JOHN GEORGE PHILLIMORE. London, Ridgway, 1846.

MR. PHILLIMORE is to be commended for his zeal in favour of Law Reform, and he is to be counselled as well as commended, in order that he may not do harm to the cause he takes in hand. In all changes, but most especially in those of the law, the greatest consideration and circumspection is imperiously required, and when Mr. Phillimore complains of the "busy and acrimonious hatred of enemies, and what is worse, the treacherous support of many who call themselves friends," we must inform him that the support which he

¹ In Art. II. of No. VIII. p. 273. the Resolutions laid before the House of Lords by Lord Brougham last session are given at length. They state the general arguments, and also describe the construction of a tribunal such as is here referred to. We therefore omit the particulars, which the writer of the present article had subjoined on the details of this question.

We are glad to find that in the recommendations which we have made, we have the support of our contemporary the "Edinburgh Review." In a valuable article in the last number (January, 1847) of that work, it is said, "We have already adverted to the specific legislation (or legislation by private acts), which is now done directly by the British Parliament. It appears to us that this legislature is just as detrimental to the power and influence of the sovereign authority as to the interests of the parties whom it affects directly, and other interests of the country which it affects by remote consequence; that the function should be delegated, with such exceptions as a close scrutiny would suggest, to subordinate functionaries, endowed with the *judicial* qualifications which the exercise of it demands, and that this measure would be justified by numerous and weighty analogies, as well as high considerations of public utility."—ED.

terms treacherous may only have been wise and prudent, because knowing, and because wise and prudent and knowing, therefore successful, and because successful valuable, while a "busy and acrimonious hatred" displayed towards those useful and respectable friends may very possibly proceed from mere shallow conceit and ignorant zeal. We shall explain as we proceed our grounds for considering this writer as ill-informed, and as exceedingly rash in both his opposition and his advocacy.

We venture in the outset to question the great prudence of a lawyer and law-amender beginning his pamphlet by a panegyric on Oliver Cromwell—his "deep policy and all-subduing sense,"—him "hailed by Milton chief of men." We presume Mr. Phillimore is a recent ally of the Whig party, else he would be aware that no men more disapprove the republican notions of Milton, and the tyranny, military and fanatical mixed in equal proportions, of the Protector. To say that his policy was "deep" is nothing, when it was of the most cunning and perfidious cast; and to speak of his "all-subduing sense" is as futile, when he turned it to subduing freedom and enslaving his country. As for his being "chief of men," if an honest republican like Milton could *really* so mean to describe him whom the virtuous Hutchinsons and Vanes of the age regarded as a hypocritical tyrant, it is no reason why a Whig should now so regard him; but that in respect of rank and power he had reached the summit, Milton might justly say; and as we know not in what passage the praise occurs, we will not pronounce in which of the two senses, the true or the untrue, the words were used. Suffice it to state that we differ widely from Mr. Phillimore in his eulogy.

But if the reader be startled in the threshold with such doctrines, he will not much recover his tranquillity of mind when he proceeds into the building. No doubt he has persuaded himself that caution is another word for timidity,—that delaying to teach until you have learnt is a silly procrastination,—that boldness is always shown by shutting your eyes to each risk,—that reformers can scarce ever be charged with rashness, how hastily, how thoughtlessly soever they

rush on to their object,—and also that it is a wise and practical mode of proceeding to multiply your adversaries as far as possible,—a skilful way of attacking any one abuse to league in its defence not merely those who reap its gains, but all others who have no kind of concern with it. These seem to be this law reformer's notions of what is safe, and practical, and judicious. They are none of ours, and therefore we venture to question what particular use there is in prefacing an attack on the abuses of special pleading by an assault upon the clergy and the prelates, “for thinking that the revenues set apart to provide for the spiritual welfare of the institutions of Great Britain cannot be better employed than in paying 10,000*l.* a-year to one bishop, and 14,000*l.* to another, when there are hundreds of thousands in civilised England who never heard of a God, and millions destitute of all education.”¹ This exasperation against the Church, too, comes soon after a very large reduction has been made in the revenues of the bishops.

Again: we gravely doubt the judgment, as well as the knowledge of judicial history, which dictated so sweeping a charge against all the older judges as p. 51. presents:—“Down to a very recent, almost contemporary period, the share of intellect and honesty allotted to the judgment-seat in this country has been most remarkably inconsiderable.” More, Bacon, Somers, are nearly the only “great men who had occupied it.” Lord Clarendon was “hardly to be called a lawyer” (which is perhaps true enough); Lord Mansfield, too, “scarcely deserved that epithet,”—though praised for efforts to methodise the law and make it less illiberal; and “for one Hale, Hotham, Wilmot, we have (omitting the more conspicuous infamy of Jeffreys and Jones), swarms of the Sawyers (who is termed a “wretch” in the note), Scroggs, Saunders, Pages, Alibones, the pest and scandal of their profession and their country.” This writer is fond of quoting French sayings. We recommend one to his attention which Sir S. Romilly was fond of citing,—“On diminuer tout ce qu'on exagère.” To hold up Bacon for his

¹ There is a great deal more in p. 8 of a like quality...

honesty, to deny Mansfield the title of a lawyer—not a great lawyer, but a lawyer at all—to affirm that the Bench always swarmed with men who were “pests of the profession and the country,” comes more within the scope of this sound caution than anything which has been published since the time of that temperate and judicious writer, the late Mr. Cobbett. Indeed, beside the total silence respecting all learned and honest judges before our own day, or the day immediately preceding our own, we suppose the passage in p. 55., setting forth that from 1807 to 1819 “the most incapable of mankind were systematically selected for their incapacity for the highest offices,” must have some kind of reference to the law, else why is it intruded here? Surely it cannot mean that Canning, Huskisson, Peel, Gibbs (as Attorney-General), Shepherd (as Attorney-General), or even Wellington, Hill, Murray, or our ambassadors, the Stuarts, the Wellesleys, the A’Courts, were the most incapable of their species, and were selected on account of their incapacity. Then, it must mean the judges selected by Lord Eldon, the object of Mr. Phillimore’s unceasing virulence. Up rise to support his assertion the following “most incapable of mankind,” each bearing on his front a scroll “selected for very singular incapacity,”—Abbott, Wood, Bayley, Holroyd (a Whig), Richardson, Littledale, Leach, Gibbs, Shepherd. If Mr. Phillimore really does know what he means, should he choose to mean any thing except abuse of Lord Eldon, we should like to have the secret imparted to us.

Next to Lord Eldon, Lord Ellenborough is the personage most obnoxious to Mr. Phillimore’s wrath. He is called “the most tyrannical of modern judges,” and “under his scourge the press was red and raw.” As a proof we are told that it “was a libel to call the government of Eldon and Castle-reagh oppressive and odious,” or “to call Lord Sidmouth the Doctor.” This is misstated. The nickname alluded to was bestowed for twenty years and more, till men became tired of the joke; and never was any prosecution attempted for it. “A sort of Flavian persecution was set on foot against Romilly.” How? When? He was respectfully heard in

Parliament; he rose to the head of his Court; he was elected, by a large majority, member for Westminster, without once appearing on the hustings, and without any opposition from the government, Sir M. Maxwell being only set up against Sir F. Burdett. It is true he carried few of his measures for amending the law, yet we doubt if Mr. Phillimore has any right to say that, had he lived, he would undoubtedly before this time "have done a vast deal more than he did." He never attempted to reform the Court of Chancery. Were he now alive he would hardly know the criminal law, so exceedingly is it mitigated beyond any thing he ever dared to hope; nor would he recognise the Law of Real Property, of Bankruptcy, of Insolvency, were he happily restored to us. A note suggests that Lord Ellenborough ought to have been impeached for his conduct on Lord Cochrane's trial (p. 55.). Surely Mr. P. must know — he cannot be so ill read in the later pages of our parliamentary history as not to know — that Lord E. *was* impeached. Lord Cochrane himself preferred articles of impeachment against him. There was no love of the Chief Justice in the Whig party, and yet no supporters could be found of that impeachment. Were all the Commons terrified, or were they bribed? But Lord Cochrane's own counsel (no favourites of Lord Ellenborough) have distinctly told the world that his conduct at the trial was precisely such as he would have held on any common case supported or opposed by conflicting evidence; and though they disapproved the verdict, they never could discover the least grounds for impeaching the conduct of the Judge. Truly it will not do for this gentleman to set himself up as the only person of sound judgment and pure principles, and to deal about his abuse against all towards whom he has from any reason conceived any ill will.

We have given some reasons for considering him a most unsafe counsellor in law amendment, and even a dangerous ally in this great struggle. But we have to add one more sample of his good sense and sound judgment, which might probably not be credited if we were not to quote the very words in which he expresses his opinions: — "That night, for ever memorable in the history of mankind, the night of

the 4th August, 1798, when all these tyrannical restrictions were swept away. We may look in vain for any monument of similar wisdom and philanthropy in the records of our legislation." (pp. 69, 70.)

Can it be true that any person, we do not say any lawyer, — for the author of this incredible passage chooses to suppress on his title-page the fact of his being himself a barrister, — but that any rational being, should really set his name to a statement that the night of the 4th of August, 1789, was a monument of "wisdom and philanthropy" exceeding all the efforts of all other lawgivers? Can Mr. Phillimore be aware that all men, of all opinions, have ever since the 4th of August, 1789, reflected with consternation upon a set of men acting under the influence partly of momentary excitement and partly of terror caused by wide-spread insurrection, and suddenly interrupting the work on which they were deliberately employed, in order to abolish, by a single vote on each matter, without one moment's discussion, nearly all the existing institutions of their country, except only the monarchy, which they suffered to remain in name only, and, deprived of all security, because bereft of every support? Be the feudal system, and the clerical system, and the financial system of the olden times ever so faulty, who has ever, without astonishment and dismay, reflected on this sudden and unreasoning and mob-like abrogation of all, effected in a moment of exaltation and temporary panic? Who, before this writer, ever held up such a portentous deed to be admired and imitated by lawgivers and reformers of the law?

Having now given our very clear and unqualified opinion upon the demerits of this publication, we must add that had the work been without any redeeming parts, we should not have considered it as incumbent on us to take notice of it at all. But it contains many statements of defects in the practice of our Courts, and even the system of our judicature, which are deserving of attention; and although these are pointed out inaccurately, and the suggestions offered for their removal are, for the most part, extremely crude, yet the importance of the subject and the fact of the tract pro-

ceeding from a gentleman at the Bar and exceedingly zealous in the good cause, makes it right that we should give ear to him.

That he has injured his case by the careless statement of particulars and the mistakes which he commits in referring to decisions of the Courts, is certain. Not less faulty is his determination to find every thing right in all other systems than our own, than his determination to find every thing wrong at home. Here he is ignorant as well as prejudiced. Where, for example, did he discover that the Scotch system of pleading is free from "the shocking defects of the English system?" (p. 5.) Professor Bell, in 1824, when a member of the Judicial Commission, wrote a large treatise on the subject, and confined his ambition to the abolition of the *faultless* Scotch system and the introduction of the "shocking English," which that country's learned and experienced professor pronounced to be "perfect." Does Mr. Phillimore know the Scotch system of pleading? Is he aware that averments of law are confounded with averments of fact; that the arguments of counsel, nay their declamations, their jests, their quotations from the poets, all go upon the record; that even after the reform of the system, the evidence is pleaded as well as the contention of the party; that the certainty he so much desiderates in criminal pleadings consists in telling the defendant that he is charged with an offence on one or other of the days of May, or of April immediately preceding, or of June immediately following; that when cases come before the Court of Appeal from Scotland, the constant complaint of the Judges is the entanglement of the questions of law and fact, and the difficulty of bringing it to a clear point, owing to the want of our less defective system of pleading?

He speaks with detestation of the Roman pleading, and affirms that the Roman law might have shown the "horrors" of that system. Is he aware that a far better judge of both than himself, Mr. Spence, in his truly learned work, has maintained that our system of pleading is all of Roman fabrication? We do not consider this position as at all clear; but Mr. Phillimore, we are of opinion, had no right to regard

as quite indisputably erroneous the doctrine held by so competent an authority as Mr. Spence.

In p. 9. he asserts as the principal fault of pleading, "that in many instances it makes the issue of a case depend on circumstances wholly unconnected with its merits." This is not correct. Such a result rarely happens, and only from the ignorance of the practitioner. He justly says, that one fit object should be to "contract the field of chance;" and this special pleading certainly does. The very next page (10.) contains a gross and unpardonable exaggeration of the defects of pleading, and adds:—"Leave to amend is sometimes given; but the expense attending it is so enormous, that in most cases it is far more profitable to abandon the suit altogether." We write to professional readers, and we fear not to ask if so ludicrous an exaggeration ever was printed by the most ignorant layman? But the reader of Mr. Phillimore can match—peradventure even exceed this page. In p. 19. we find these words:—"Drawing lots—the inspection of a chicken's stomach—the flight of a bird—the neighing of a horse—nay, trial by battle, give justice at least an equal chance." His contention is, that pleading makes it scarcely possible the right party should win. He cites Rabelais' saying,—that the dice are thrown; "but" (says Mr. Phillimore), "with us the dice *are loaded* in favour of chicane—fraud has an advantage."

The assertion that in France no cause is ever decided on technical points (23.) is about as correct as this other (*ibid.*), that in England we hear of nothing else.

This tract is garnished with cases; but of these many are misunderstood or misrepresented. Thus (p. 14.) *Hayter v. Moat*, 2 Meeson & Welsb. is represented to have been the case of a judgment arrested for want of an averment not necessary to sustain the action, and which on the trial could not have been proved. It was arrested because in an action of *assumpsit*, no promise to pay at all was alleged, nor any averment made of a debt payable on request or before suit: it was a defective cause of action. So *Harrison v. Matthews* (p. 13.) is also wrongly stated. In p. 27. *Holford v. Bailey* is plainly the case referred to, but the blunders are

numerous. First, an arrest of judgment is not a cancelling of the verdict — or even of the judgment. Next, a judgment cannot, as he supposes, be arrested for surprise or mistake of the Judge; and, lastly, here the judgment was not arrested because the word trespass was used, but because the action of trespass would not lie. In p. 29. *Hayter v. Moat* is again referred to, and most erroneously. The arbitration was not there set aside, as Mr. Phillimore states: but the arbitrator having ordered a verdict to be entered on a count which was bad, the judgment was arrested.

Nothing can be less happy or more inconsiderate than his suggestion of a Code as a remedy of such evils as he complains of in *Forsyth v. Rotherham* and *Dickson v. Cass*, (pp. 59, 60). The case complained of was under a Code, namely the Stamp Laws; and the decision complained of would have been precisely the same if all the law had been digested in a Code. In p. 69. we perceive Mr. P. has only read the margin of *Rex v. Pyne*, 1 Moody's Cr. Cases. The Court there held that the circumstances constituted sufficient notice.

We might give other instances of inaccurate reference. One shall suffice to show how he reads cases, and then jumps at some vituperative commentary on what he misunderstands or misstates. In p. 43. he speaks of the Judges having to consider whether or not throwing boiling water was an injury. It is not so. The verdict was under 1 Vict. c. 85., making it felony to throw any corrosive fluid, or other *destructive* matter, with intent to burn, maim, &c., and the Judges had to consider whether boiling water was destructive matter within the meaning of that enactment — not whether throwing such water was an injury. Yet the same error is obstinately persisted in, and repeated in p. 46.; and the very same question objected to by Mr. P. would most probably have arisen under a Code also.

Before leaving the head of this author's want of accuracy or want of information, we must refer to what he dwells on with so much glee, the changes in the law by the decisions of one time overruling those of a former. No doubt judicial legislation, or what Mr. Bentham used to call judge-made

law, exists, and no doubt it must exist, while men are fallible and subject to error, and while laws are their works and liable, as such, to obscurity and to imperfection. But whoever hopes to see all such law put an end to by a Code will be greatly disappointed; for he has only to look at the volumes of French decisions on the construction of the Five Codes, and learn that such will not be the effect; and this we say, though warm friends to codification, and sanguine in our hopes of its beneficial effects on the present fluctuating state of the law. Mr. Phillimore, however, has no right to suppose that he has been at all correct in illustrating this fluctuation, when he refers to decisions overruling their predecessors. Thus *Gill v. Cubit*, 3 B. & C. 466, was overruled. But it was a case that overruled the old law, perfectly well established before, that a person who took *bond fide* a bill payable to the bearer had a good title. And the overruling of *Gill v. Cubit* restored that old and established law which *Gill v. Cubit* had overthrown. Of this the author seems not to be aware. So he speaks of *Ryan & Moody*, 268. (*Edwards v. Etherington*) as having "*fixed the law*" respecting a tenant's right to quit premises out of repair. It did no such thing; it was a case of the first impression, and is certainly no longer law.

The remarks of Mr. Phillimore on the difficulty and expense of bringing cases to an issue are in some respects well founded, and our objection is to the arrogant and thoughtless manner of expressing them, and to the remedy which he proposes as perfectly easy, simple, and effectual. It is easy to say Why not let the parties come at once before a Judge, and under his direction state their claims and defences, with time given, if it be needed, after one hearing to return? Unfortunately, this assumes that all parties are equally able to come in person, and to battle against each other when they come. If their lawyers come, how can they take any step without an adjournment to consult their clients? For how can any one know till he hears it what his adversary's claim, or answer, or replication, or rejoinder may be? Then, if such appearance is to be followed by an adjournment and a further meeting, what is gained, except that the pleading

must be made *ore tenus*, and a minute of it taken by the Court? But this is exactly recurring to the ancient and rude mode of pleading, and would gain nothing in either cheapness or accuracy. The course for ages taken of reducing demands and defences to writing is obviously much to be preferred, because it conduces to accuracy, binds parties, prevents frauds, conveys full notice both to the adversary and to the Court. Pleading is founded, as regards its fundamental principles, on plain sense. It has, as Mr. Phillimore maintains, become too technical. Refinements have been intruded by professional ingenuity and subtlety, which have frequently superinduced a less constant regard than is desirable to the substance, the main object of notice. The evils so casually introduced have been occasionally remedied by the Courts, and a very great and very general improvement was lately effected by the legislature, and effected in the only way in which changes of the rules of practice can be safely accomplished. Powers were given to the Judges to make rules of pleading, subject to the sanction of both Houses—for the dissent of either abrogates any of the rules thus made. Mr. P. complains of this course of amendment, and holds it absurd that the Judges should be consulted on such a subject. He deems those best acquainted with the matter the least fit to deal with it. He would have some men wholly inexperienced to handle it, on the trivial pretext that those whose lives have been passed in administering any set of principles become so enamoured of it as to be incapable of discovering its faults. Why, the enamoured Judges have introduced far more sweeping changes in the system under the act alluded to by this writer, than any legislator ever before ventured to propound. The reason why no other course of legislation could safely have been followed is plain. Until men become omniscient, rules made to-day may be found in practice to work mischievously: and if a statute laid these rules down, months must elapse before they could be altered, whereas those under whose immediate observation the working of their own rules proceeds can at once perceive the mischief and apply the remedy. We had really conceived that this course of proceeding was liable to as little objection as possible. Let Mr. Phillimore only

reflect on the inevitable consequences of a change introduced by statute being found to work palpable mischief.

We find Mr. Phillimore a great enemy of the present mode of administering justice at sessions, and calling for learned judges as assessors to preside in these tribunals. It is no doubt true that a learned chairman would be a great improvement, as it is found to be in Ireland. But this writer exaggerates the mischiefs of the present system, if he means to give so rare a case as a Parson Justice, "deriving a regular income from his fees," (p. 77.) for a fair sample of our unpaid magistracy. Nor can the reader of his pamphlet fail to mark that the only sessions of which the author has had any experience personally, those of Stafford and Salop, are admitted, by his own confession, to be conducted in such a manner that no one can dispute "the learning, patience, ability, and zeal for justice with which these gentlemen fulfil the arduous task that a sense of public duty has made them for the benefit of their neighbours, and to their personal discomfort, to accept." (p. 80.) Mr. Phillimore, it appears, attends these sessions as counsel.¹ It seems to be a most fortunate sessions!

This tract is none of the shortest; it occupies above eighty pages—yet want of space is complained of towards the end—and for why? Because it "hinders Mr. P. from dwelling on the mischief done by juries in most civil cases." (p. 81.) We don't think Mr. P. has any good reason to regret that his "space hindered" him from treating on this question.

It might be thought that we have dwelt too long on this publication. But surely, anxious as we are for the amendment of the law by any safe and intelligent process, it becomes us to guard against those who are, with whatever good intentions, the very worst enemies of that great cause. No

¹ It is to be observed, that had an Ex-chancellor (Lord Brougham), to whom Mr. P. refers, possessed any thing like the "almost absolute power, without any limits," ascribed to him by the writer (p. 6.), a remedy would have been applied to the sessions' evil by the formation of local courts—an indispensable preliminary also to Mr. P.'s other scheme of simplifying pleading. Indeed Courts of Reconciliation formed part also of the plan which the "almost absolute power" of the then Chancellor was unable to carry through the House of Lords. So the same "all-powerful" minister was, as is well known, defeated in his Chancery reforms.

prejudiced bigot of them all, no sworn enemy of all progress, can do more harm to the measures in progress and in contemplation for improving our jurisprudence, than a few such evil counsellors and wholly unreflecting supporters of Mr. Phillimore's school would inevitably effect, were they believed to influence our proceedings. Such a tract as we have been exposing — with its wholesale denunciations of men and institutions, its recommendations of the French Revolution in nearly the worst part, certainly the most precipitate, of that long and frightful tragedy, its attacks even upon trial by jury, simply because it is established among us — would, if not instantly repudiated by rational reformers of the law, be hailed with joy by every enemy of improvement, and held up as a proof that they who have conceived plans of improvement are really hatching the mischief of revolution.

One word to Mr. Phillimore himself. He shows in this pamphlet great earnestness and some vigour of expression. He is, moreover, bold and fearless: if then, he thinks a little more before he strikes the next blow, — if he considers more carefully his own position, the means which he has at his command, and the grievance that is to be remedied, we have hopes that his powers, which are considerable, may still be useful to our common cause.

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ART. IX. — SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW. — REPORT ON SECONDARY PUNISHMENTS. — JUVENILE OFFENDERS.

At a special general meeting of the Society for Promoting the Amendment of the Law, held on Wednesday the 16th of December, 1846, it was referred to the committee on the Criminal Law, "to report on the principles on which secondary punishments ought to be awarded and conducted; and further to report on the various plans, which have been tried or proposed for the improvement of the treatment of criminals and young persons likely to become criminals."

Our attention was first directed to the important fact, that the number of commitments on criminal charges has been, on an average of years, increasing in a higher ratio than the population of the country, and also to the fact, no less important, that the number of juvenile prisoners is on the increase as compared with that of adults.

We also find¹ that in the year 1843, 29,871 persons were committed for trial in England and Wales, and 73,196 summarily convicted, making a total of 103,067 individuals imprisoned in our gaols in that year; and that, out of this number, 34,383 criminals, or about one-third of the whole, had been previously committed.

We do not state these facts as proving in themselves that crime is on the increase, because we feel that the facility in detecting offences, which has been caused by the late improvements in our police establishments, and the comparative readiness with which parties now prosecute offenders, in consequence of the recent abolition of the punishment of death for a variety of crimes, will account in great measure, if not altogether, for the additional number of persons committed: still we draw attention to the facts, as showing, in

¹ See Supp. to 10th Report of Inspectors of Prisons, p. 10. 13. 48.

the most forcible manner, the vast importance of the subject submitted to our consideration.

Our first care has been to ascertain on what principles secondary punishments ought to be awarded and conducted; and here, without adverting to the old doctrine of *vengeance*, further than to express our hearty satisfaction that it is now universally exploded, we may observe, that the only two principles which find supporters in the present day are, first, that which inflicts pain by way of warning or example, and next, that which seeks the reformation of the offender. In both the prevention of crime is the ultimate object, that object being sought by the one through the medium of fear, and by the other, by calling into activity those dormant virtues which are never utterly extinguished in the human breast. With respect to the former principle, we think that it is by no means entitled to the exclusive credit which its advocates claim for it; since, however sound the doctrine, "*ut metus ad omnes, poena ad paucos, perveniret*," may appear when considered in the abstract, we feel that, practically, the deterrent effect of the dread of punishment has been vastly overrated. If a person were *sure* that, on his committing a crime, he would be *immediately* subjected to pain, he would doubtless be in general deterred from its commission; but if, as is the case in actual life, he considers it highly doubtful whether he shall ever be detected, and if detected, whether he shall ever be prosecuted, and if prosecuted, whether he shall ever be convicted, and if convicted, whether the conviction will not be set aside for some technical error, the chances of impunity appear to be so much in his favour, that, relying on his good luck and better address, he often remembers the pleasure of the crime, and forgets the pain of the punishment. Still, it is not to be denied, that with all its drawbacks, the dread of punishment has a very salutary effect in repressing crime, especially over such persons as are not hardened offenders; and if, by sharpening the vigilance of the police, by affording facilities to prosecutions, and by preventing the escape of criminals on technical grounds, punishments were rendered more *certain* and *speedy*, this dread would not be inoperative, even with respect to the worst of

our penal population. The principle, therefore, of inflicting pain for the purpose of inspiring dread, must ever be retained to a certain extent in any sound system of secondary punishments. On the other hand, the principle of reformation is one deserving the most serious attention. It has, indeed, only of late years been brought prominently forward, because, until recently, the unrestricted intercourse of criminals in our gaols rendered their reformation almost entirely hopeless; but now that the partial adoption of a system of separation has afforded means for introducing into our prisons a reformatory discipline, the intrinsic value of the principle has been tested and established.

Were it necessary for us to determine the relative value of these two principles, we should have an extremely difficult task to perform; but this is not requisite, because we are convinced that both principles may co-exist, and that the soundest system of punishment is that which effects the objects aimed at by each. Indeed, so far as they conflict with, or do not support each other, we think that they should, both of them, be disregarded. For instance, if a particular punishment be an object of dread, but has no tendency to improve the moral character of the criminal, this, in our opinion, is not the best discipline that can be devised; neither is that the best which, though calculated to reform the individual subjected to it, has no terrors for other offenders; but the best discipline is that, which at the same time reforms the convict, and inspires his associates with dread.

Having now stated our views respecting the principles on which secondary punishments should be awarded and conducted, it remains to be considered how far the discipline in our *prisons* is consistent with them. We here purposely abstain from entering into any discussion on the subject of transportation, as this might conveniently occupy our attention upon some future occasion.

In a large proportion of our *gaols* we find that the prisoners are permitted to associate together with little or no check upon their contaminating conversation; and further, that idleness, either total or partial, prevails to a great extent. This is an execrable punishment, which neither affords the

means of reformation, nor is an object of dread ; but on the contrary, it degrades and hardens its victims, and is so little feared by them that they return again and again to gaol, and often commit offences for the express purpose of being sent there during the winter months.

In most of our *houses of correction*, hard labour is introduced in the shape of the tread-wheel. This punishment is certainly an object of fear, and so far falls within one of the principles stated above : but then, instead of reforming the prisoner, it has a directly opposite tendency. Indeed, no labour can be imagined more irritating than this. It is utterly valueless, since, with the exception of one or two places, no corn is attempted to be ground ; and, even where it is, the prisoner knows perfectly well that he is only employed in the place of the elements. Instead, then, of acquiring a habit of labour, which may be useful to him when his term is expired, his abhorrence of all work, and his revengeful feelings towards those who impose it, are only aggravated and confirmed. We think, therefore, that this species of labour should no longer be imposed.

The silent system, which, while it allows prisoners to congregate together, forbids them to communicate with each other, either by word or sign, is nominally adopted in most houses of correction. Where strictly enforced, as at Cold-bath Fields, and in one or two other prisons, it is doubtless regarded with much aversion by prisoners, and it also, to a certain extent, checks the progress of demoralization. So far, therefore, it must be regarded as a great improvement over the unrestricted intercourse and idleness of our gaols, and it is unquestionably an important step in the right direction. Still it is very far from being a perfect system ; for, in the first place, it affords no opportunities for moral improvement, and, in the next, it is found, in practice, almost impossible to enforce it with strictness. Moreover, it keeps the prisoners in a constant state of irritation, and, instead of checking, arouses almost every bad passion.

In a few of our modern prisons the separate system has been introduced with striking advantage. As an object of dread, it yields to no secondary punishment hitherto devised ; while, considered as an engine of reformation, the beneficial

results from it are in the highest degree encouraging. In speaking of this system, we would not be misunderstood. We do not mean solitary confinement, where the prisoner, without any occupation, is kept apart from every human being; but a cellular imprisonment, where, though strictly separated from all other criminals, the prisoner is daily visited by the governor, chaplain, surgeon, schoolmaster, trade-teacher, and other officers of the establishment; and where, moreover, moral, religious, and intellectual training, and really useful labour are enforced. The Pentonville, Reading, and Preston prisons afford the best examples of this discipline, and the diminution in the number of committals and recommittals, which has been occasioned by the introduction of the system in the last two houses of correction, fully justifies a well-grounded reliance on the efficacy of the punishment as a preventative of crime. Thus, we find from the last report of the chaplain of the Preston prison, that since the prisoners have been kept separate, the commitments have been 45 per cent. less than the average number for the preceding eight years, while the recommittals have diminished in an equally remarkable degree.¹

It has been urged against the introduction of useful employment in our gaols, that an impolitic competition between convict labour and free labour will thereby be established. We consider this an utterly futile objection, and one, the fallacy of which has been so often exposed when raised against the introduction of machinery, that it requires no laboured refutation from us; but we may observe, in passing, that it is infinitely less applicable to convict labour than to machinery; since the convict must be supported while suffering imprisonment from some funds, and that is far better for the interests of the community that he should be kept wholly or in part by his own industry, than by taxes levied on the industry of others. If every rug, net, and mat used in England were made in our prisons, no evil results would follow, but, on the contrary, unmixed good, since the public would be supplied with these articles at a cheaper rate than at present, and those who now gain their livelihood by making rugs, nets, or mats,

¹ 23d Report, 6—8.

would, by degrees, find employment in other trades equally remunerative. We have thought it necessary to allude to this objection, not because we deem it intrinsically of the slightest importance, but because we know that, at present, a foolish prejudice on the subject prevails.

Captain Maconochie's plan has also been submitted to our consideration ; but as his system has already been made the subject of a separate Report to the Society, it will not be necessary for us to allude to it at any length. His object, as is well known, is to make the return of the prisoner to liberty dependent upon his industry and general good conduct ; or, in other words, to subject him to imprisonment for a period, not measured by *time*, but by *marks*, which may be gained or lost, according as the prisoner is industrious or idle, well or ill behaved. As the awarding of these marks must be intrusted to the prison officers, it is obvious that the system places a very large discretionary power in these functionaries. Moreover, as the industrial powers of the individual prisoners cannot be ascertained without a somewhat lengthened experience, and as, until their powers are ascertained, the marks, which stand for a given amount of labour, cannot be awarded in any manner approaching to fairness, the practical adaptation of this system to short periods of imprisonment must, of necessity, be extremely difficult. On this ground, therefore, as well as because, without feeling any disrespect for the governors of prisons, we doubt the expediency of entrusting them, as a body, with an irresponsible discretion, we do not feel justified in advising the general introduction of the system. At the same time we are not at all inclined to reject the plan *in toto* ; for we consider that, if slightly modified, it might be advantageously adopted in all cases of serious crime, where the convicts are sentenced to long periods of imprisonment. The aggregate of such offenders is not large, and one, or perhaps two, prisons in or near the metropolis would suffice to accommodate them. Persons greatly superior to the ordinary class of prison governors might be placed at the head of these establishments ; and acting, as they would do, under the eye of the public press, the necessary discretion, with which they would be entrusted, would be liable to little, if any, abuse. We may add, that we have learned with plea-

sure, that the government intend to act upon Captain Macnochie's plan, at least to a certain extent, in the management of transport convicts.

We think it right here to express our decided disapprobation of short terms of imprisonment. Such punishments are regarded by the ill-disposed with but little apprehension; and, moreover, they do not admit of the effectual application of any reformatory discipline. In fact, the only effect produced upon the offender is that of making him familiar with a prison life, and of thus deadening the undefined feelings of apprehension, which a prison is wont to inspire in those who have never entered within its walls.

We also think that considerable alterations are required with regard to the quality of food supplied to prisoners. At present the expense of the prisoners' diet varies in different gaols to a remarkable extent; in some the cost for each prisoner being no more than three or four pounds per annum, in others amounting to nearly eight pounds. In these latter cases the prisoners fare infinitely better than paupers in the poor-house, or than persons of the same rank of life who support themselves by honest industry. This, surely, is an abuse which demands a speedy remedy. The provisions supplied to our convict population should be of the coarsest possible description, and only sufficient, either in quantity or quality, to preserve them in health; and, further, the same quantity and quality of food should be allowed in all prisons alike.

With respect to the treatment of juvenile offenders, we think that they might advantageously be subjected to a milder system of discipline than older criminals. The moral, intellectual, and physical destitution of these poor children, who for the most part are either orphans, illegitimate, or the issue of criminals, or otherwise the victims of parental unkindness and neglect, naturally enlists very strong sympathies in their favour; while their youth, by rendering them more susceptible of impressions than those who have arrived at a hardened manhood, enhances the probability of their being ultimately reformed, without having recourse to any great degree of severity.

With the view of ascertaining how far it would be safe to

relax the ordinary punishment of crime in favour of these unhappy children, we have sought for information on the working of the celebrated establishment at Mettray, near Tours. Persons received at Mettray are male convicts under sixteen years of age. They are not in actual confinement; but if they behave ill they may be sent back to prison. They are distributed into families, each consisting of a master, two assistants, and about forty convicts. They are all taught some useful branch of industry, the majority being instructed in agriculture and gardening. These families are combined for certain general purposes, as military exercises, gymnastics, &c. They are also addressed as one body, by the principal, on subjects of practical religion and morality, and together they attend public worship. Their food and clothing is of the plainest description. Since the first establishment of the institution, in 1839, 521 boys have been received. Of these 17 have died; 12 have been sent back to prison; 144 have been placed out in various situations, and the remainder are still at Mettray. Of the 144, 7 have relapsed, and 9 are of doubtful character; but the remaining 128 are conducting themselves to the full satisfaction of the directors. So far, therefore, as regards the reformatory character of the discipline, the institution must be considered as a most successful experiment. Our attention was next directed to the Warwick County Asylum, an industrial school for the reception of young convicts, which has now been in operation twenty-eight years. The number of convicts who have left this school is 243, and of this number sixty per cent. have been permanently reformed, without a single relapse.

It should be more generally known than it is, that by the act of 1 & 2 Vict. c. 82. s. 11. societies undertaking the care of young convicts are empowered to remit them to prison in the event of their not conforming to the rules and regulations of the institution.

It is the opinion of many experienced persons that the work of reformation should begin before a child has become familiarized with a gaol, and when he is comparatively unhardened. With this opinion we cordially concur, and are much gratified to see that it is likely to be extensively acted upon.

An important meeting, attended by the Bishop of London, and by many noblemen and gentlemen of weight, was held at the Mansion-House in February, 1846, for the purpose of considering a plan for the establishment of asylums for young persons likely to become criminals.

The main features of the plan, which was proposed by the City Solicitor, Mr. Pearson, are, that national asylums should be established, in which young persons may be received and classified according to their sex, age, and strength, as well as their past pursuits and associations; that these establishments should be conducted by government officers, and placed on the lines of great trunk railroads, so as to admit of cheap and ready access; that out-of-door labour should be united with mental and religious education, and with instruction in mechanical employment; that the diet should be of the simplest kind; and that the cost of clothing and feeding the inmates, or so much of it as is not furnished by the labour of the youths, should be borne by the parents, when this can be enforced, or otherwise by their parishes.

Mr. Pearson calls attention to the important fact, which has been so often urged, that criminals at large preying on the public, are far more costly to the community than if under control, employed in labour more or less productive.

He also proposes for parliamentary enactment, that all children, under a given age, violating the law, or found in such a state of destitution as experience abundantly shows must lead by a sure consequence to crime, shall, by the order of a magistrate, be sent to one of the intended asylums.

We hope these valuable suggestions will be carried into effect; but in the event of their being so, we deem it essential that the discipline, though not needlessly severe, should be of such a nature as to inspire a wholesome fear in the minds of the children themselves, and to deter their parents from exciting them to commit offences, for the purpose of rendering them eligible to become inmates of such asylums.

We understand that several of our largest cities and boroughs have expressed, through their town councils, their general concurrence in Mr. Pearson's plan; and Mr. Henry

Pownall, one of the magistrates for the county of Middlesex, has, we believe, obtained the assent of his brethren to promote an act of parliament embodying very similar suggestions.

To some extent, the principles advocated by Mr. Pearson and Mr. Pownall are already in action; for the schools established under the authority of the Poor-law Commissioners have given a most useful industrial training to many children, who would otherwise have passed through life as hereditary paupers, leaving behind them a progeny still more miserable and debased. Useful establishments, too, under the name — not very happily chosen — of Ragged Schools, have been founded in the metropolis and elsewhere with beneficial effect.

The length to which our observations have already extended precludes us from entering into details respecting these establishments. It remains only to state, as the sum and substance of our report, the following resolutions:—

1st. That punishment should be awarded and conducted in that manner alone which is calculated, at the same time, to reform the offender, and to deter others from committing offences.

2d. That, in order to carry out these principles, it is expedient,

1st. That all gaols, where unrestrained intercourse is allowed, should be abolished.

2d. That neither convicted, nor unconvicted prisoners, should be allowed to remain in prison in a state of idleness.

3d. That tread-wheel labour should be abolished.

4th. That the building of district prisons, within a limited time, should be rendered compulsory.

5th. That such prisons should be so built as to afford separate accommodation for each prisoner.

6th. That useful labour, *e. g.* mat, rug, basket, or net making, tailoring, washing, shoemaking, sempstressing, knitting, &c., should be uniformly introduced in all prisons.

7th. That these occupations should be taught by competent persons attached to each prison.

8th. That a better class of schoolmasters should be appointed with larger salaries, and that it should be com-

pulsory on every criminal to attend school for a fixed time each day.

9th. That to each gaol a chaplain should be attached, with a salary sufficiently large to insure competency, and that it should be incumbent upon him to reside in the prison, and to give his undivided attention to the spiritual wants of its inmates.

10th. That, assuming the above alterations to be carried into effect, short sentences, *e. g.* sentences under one month, should be discontinued.

11th. That a coarse, plain and uniform diet should be enforced.

12th. That for juvenile offenders, and other destitute children, one or two large asylums should be established, on a somewhat similar plan to that proposed by Mr. Pearson; only taking care that the discipline be sufficiently severe.

COMMITTEE ON THE LAW OF REAL PROPERTY.

The following reference was made to this Committee:—

“To consider the propriety of making a general Map of the lands of England and Wales, for the purposes of registration and conveyance, and otherwise; and to ascertain what steps have been taken, and what materials are forthcoming for making such a Map.”

Your Committee find that the propriety of making such a general survey and map of the kingdom as that described in the above reference, or of such reforms of the law as would greatly increase the need for such a survey, have from time to time, during the last twenty years, been recommended to the legislature by Committees of both Houses of Parliament engaged in inquiries connected with this subject, as well as by other parties whose knowledge and experience appear to your Committee to entitle their opinions to respect. And that of the various purposes proposed to be served by such a map, in the propriety of which your Committee are inclined to concur, those most generally urged have been—to provide both the government and the community with such accurate

information as to the extent, the character, and the divisions of the surface of the country, as might facilitate the conveyance of real property, the administration of justice in disputes concerning boundaries; and, generally, the rendering more accurate, and more easy, all transactions affecting the land of the country, either as between individuals, or as between the government and the public.

Your Committee, approaching the subject under the above reference, have directed their attention, in the first instance, to the propriety of making such a map with a view to facilitate the conveyance of real property. They find the propriety of its construction for this purpose sustained principally by arguments connected with, though not necessarily dependent upon, a plan for the general registration of deeds and instruments affecting real property, upon which your Committee have already had occasion to report. For the complete development of this or any similar plan, the construction of such a map appears to be very desirable, if not absolutely necessary. And as the nature of the map required would be, generally, the same for any purpose connected with conveyancing, your Committee proceed first to consider the subject before them in reference to the plan of registration and conveyance alluded to.

The plan in question presupposes that every separate plot or parcel of land brought under its operation shall be delineated and identified upon a public map; which map shall be accompanied by a register descriptive of such needful particulars in reference to each parcel as cannot, with convenience, be given upon the face of the map itself.

Such delineation and supplementary description are deemed necessary to the proposed plan of registration, as furnishing the principal means by which the economy, simplicity, and certainty anticipated in its operation are to be attained. They are considered necessary to its economy, as enabling the parties to the disposal of real property, in most cases, if not in all, to substitute a short reference to the land dealt with for the long written descriptions at present in use — necessary to its *simplicity*, as identifying the method of precise legal description with one which experience has proved to be amply sufficient, and which is already widely in use and

well understood — and necessary to its *certainty*, as reducing to a minimum any doubt of the nature or identity of the property affected which might otherwise arise from shortening the present method of description.

Following the terms of the reference, your Committee have, in considering the propriety and the means of constructing such a map, directed their attention to three points of inquiry: —

1stly, The description of map required for the purpose in view.

2ndly, The probable expense of its construction.

And, 3dly, How much of such expense may be saved by adopting the results of surveys already made, or undertaken, for other purposes.

And they have to submit the following as the conclusions at which they have arrived upon each of these points: —

The Description of Map required.

The chief requisite, in the required map, being the delineation of every separate property, in such a manner as to leave no reasonable doubt as to its identity, it is obvious that it must be constructed upon a scale sufficiently large to admit of a distinct display of each plot, however small.

On the other hand, it is desirable that the scale should not be larger than is necessary, because almost every expense attending the construction and use of the map is increased with the size of the scale.

And as the considerations just stated have a different bearing in different localities, they lead to the conclusion that the proposed map should not be constructed upon a uniform scale.

To describe the boundaries of house property in towns, it appears, from the best evidence your Committee can obtain, that a scale less than that of one chain (or 66 feet) to the inch, would not be sufficient. But in rural districts a scale of six chains (or 396 feet) to the inch would in all, or nearly all cases, be sufficient.

A map constructed on the former scale would give to every actual space of 484 square yards one square inch upon

the map. This would, perhaps, barely serve to identify the sites of the smallest divisions of house property in towns. But if the same scale were extended to the country, a field of five acres would cover, upon the map, a space rather more than seven inches square; and an estate of 2000 acres would require nearly 140 square feet of map; and would thus be not only unwieldy in use, but less efficient, as a description of the property, than if it had covered only one sixth of that space.

An extension of the same considerations leads to the inference that districts of country only partially inclosed, and abounding in tracts of uncultivated land, might be sufficiently mapped upon a scale even smaller than that of six chains to the inch.

The propriety of adopting several scales being admitted upon the grounds above specified, it is found to be further supported by the opening it affords for proportioning the local expenses attending the construction and use of the map in some degree to the value of the several descriptions of property included in it.

The description of map required, in reference to the scale upon which different parts of it may be constructed, also requires some consideration in reference to the proposed connection of the map with a register of particulars of the several properties, in addition to those given upon the face of it. As a reference to the accompanying register could only be made with the aid of a distinctive mark upon each plot, as it appeared in the map, it is obvious that the scale must be large enough to admit of the insertion of such a mark upon every separate plot. What method of marking the plots might, in practice, be found most convenient, may be matter of doubt. That which appears to be the most simple is — by adopting the numerals in common use, the application of which to the purpose in question is already well understood. And as an adherence as close as may be practicable to existing usage is extremely desirable in the introduction of a plan so novel and extensive, your Committee incline to the adoption of numerals simply.

It would, probably, be found advisable in reference to the working of the proposed, or any similar plan of registration, to

divide the country into districts of the size most convenient to be treated under one superintendence. The extent of such districts would of course depend upon various considerations connected with the nature of the plan, *as a whole*, 'some of the most important of which are not properly within the scope of the present inquiry. The most obvious of these, however, suggests to your Committee the probability of its being found advisable to base the divisions upon a regard, rather to the number and value of the properties included in each district, than merely to extent of surface, or to the accordance of the lines of division with boundaries previously established for other and widely different purposes. And should this view of the subject be adopted, it would certainly be strengthened by those other considerations affecting the division of the map of the country which have more particularly engaged the attention of your Committee.

Assuming that the map would be divided into parts corresponding with the extent of the supposed districts, and that common numerals were used for distinguishing the plots, it would obviously be desirable that the number of plots included in any one district should not be so great as to interfere with the insertion of the highest numbers required to be used upon the smallest divisions shown on the map. To embrace as many as one million of separate divisions (less one) six figures would be sufficient; and it is found that this number of figures may be written with the required degree of distinctness within the space of half an inch. The scales already mentioned—of one chain to the inch for towns, and six chains to the inch for the country—would afford that space for every length of 33 feet in the former, and 198 feet in the latter. These scales, in districts so divided as not to include more than a million of separate divisions of property, would, therefore, admit not only of complete identification, but of distinct reference to the accompanying registry by the use of ordinary numbers. It therefore becomes a matter of some interest to ascertain, whether the land of England and Wales might be divided under the limits suggested, without inconveniently multiplying the number of districts. Your Committee are of opinion that it might; and have come to that conclusion upon a review of the following facts.

The most authentic estimates of the area of England and Wales make it about 36,500,000 acres. Of this it appears that there are at present about 29,000,000 of acres cultivated, 3,500,000 uncultivated, and 4,000,000 unfit for cultivation. If the cultivated portion (of course excluding the sites of towns) be assumed to be divided into portions of the average extent of four acres (which your Committee have reason to believe is very near the truth), the whole number of separate plots in this portion of the surface of the country will be 7,250,000. For the number of separate divisions of the surface in towns and populous districts, it may suffice for the present purpose to take the total number of inhabited houses returned at the census of 1841 (2,753,000) and, assuming that one half of these are situated in the towns and more populous districts of the country, to add for the smaller divisions of the surface occurring in and near to towns, and exclusive of the sites of houses, an equal number. Upon this basis, the total number of separate divisions of property in the cultivated portions of the country and in the towns and populous districts together will be 10,003,000. If the uncultivated and unprofitable portions, covering the remaining 7,500,000 acres be assumed to be divided into parts, averaging 100 acres in extent, they will give an additional number of 75,000 plots, making the aggregate number to be distinguished on the map 10,078,000. The entire surface of England and Wales might, therefore, if necessary, be divided into less than twelve districts, no one of which should contain so many as one million of separate divisions of the surface requiring distinct notice on the proposed map, and in the accompanying register.

Probable Expense of Construction.

In entering upon the question of probable expense, your Committee have deemed it advisable, in order to arrive at the soundest attainable conclusions upon a portion of the subject so vitally affecting the present practicability of the scheme before them, to begin by inquiring what would be the expense of constructing the required map, were it to be undertaken as a separate work and without the aid of any survey already made. The work to be done, and the probable expense of each portion of it, being thus ascertained,

it will only remain, in order to find the expenditure actually required to be made, to ascertain what portion of each part of the work has already been done, and the proportion its expense bears to the whole. A simple deduction of the aggregate of what has been done, from the aggregate of what was in the first instance required, will then exhibit the net expenditure still called for.

The cultivated land of England and Wales is, as we have said, estimated at about 29,000,000 of acres. In this is included the sites of towns, the aggregate of which, however, can scarcely be estimated with any certainty of an approach to accuracy. But, as the metropolis, covering a surface of about 15,000 acres, contains nearly 2,000,000 of inhabitants, it may be safely assumed that the whole town population of England and Wales is located upon an aggregate extent of surface less than six times the area of the metropolis, and therefore considerably less than 100,000 acres, which, for the present purpose, would form no material deduction from the space assumed to be occupied by the cultivated land, and may therefore be disregarded in an estimate of the cost of surveying and mapping it.

Your Committee find, on inquiry, that the average expense of surveying and mapping cultivated land, upon the scale of six chains to the inch, is about 9*d.* per acre; which, for 29,000,000 of acres, gives 1,087,500*l.*

The uncultivated land, supposed to amount to about 3,500,000 acres, and which commonly adjoins or is partially intermixed with that which is cultivated, might be surveyed and mapped at an average cost of about 4½*d.* per acre; the expense for this portion of the country would therefore be about 65,625*l.*

And to survey and map the unprofitable portions of the surface, comprising all the remainder of the country, and estimated to include about 4,000,000 of acres, would not cost more than 3*d.* per acre, or, in all, 50,000*l.*

The survey and mapping, in like manner, of towns and populous districts, on the scale of one chain to the inch, would, according to one estimate procured by your Committee, cost about 2*s.* for the site of each house. Another estimate states the expense at about 1*s.* 7*d.* for each house. Both

estimates rest upon high authority, and your Committee are inclined to adopt the highest, simply as the safest, and as involving least risk of objection. If we assume, as before, that one half of the houses in England and Wales are within such districts, their number would be 1,376,500, and the expense, at 2*s.* each, 137,650*l.* If to this we add the expense of surveying and mapping upon the same scale, as many more divisions of property necessarily included with the sites of houses, at 1*s.* each, amounting to 68,825*l.*, the total expense of surveying and mapping the towns and populous districts of England and Wales may be stated at 206,475*l.*

It thus appears to your Committee that the entire expense of a survey and map of England and Wales of the required description, upon the two scales referred to, would be about 1,400,000*l.*

Your Committee have forborne — not deeming it within the terms of the present reference — to consider the practical details of the construction and use of the proposed map beyond the point at which they acquired, as above stated, a tolerably accurate idea of its cost in the first instance. They may, however, be permitted to state that, so far as they have proceeded in the inquiry, they have not, incidentally, discovered any reason whatever for supposing that the construction of the map, in the manner above proposed — or its use, for any purpose yet contemplated — or its renewal, periodically, so as to include all changes of boundaries, &c., would be attended with any practical difficulty of importance. On the contrary, they have some reason to conclude that any further pursuit of the inquiry, with a closer and more extensive reference to these details, would tend to prove that the expense of bringing the map into actual use, as well as the current cost of maintaining it in a state of perfect efficiency, would be much less than might be generally expected, and very small in proportion to the benefit derived from it.

Of what has been done.

Of the surveys already executed or begun, and of the results of which advantage might be taken in the con-

struction of the proposed map, your Committee find that the most important and valuable are those executed under the superintendence of, or sanctioned by, the Tithe Commission. These also include the surveys executed from time to time at the instance of the Poor Law Commission.

The returns presented to Parliament by the Tithe Commissioners do not, however, afford the means of estimating, in a satisfactory manner, the extent of the surface of England and Wales yet covered, or likely to be ultimately covered, by these maps. Your Committee are therefore indebted to the aid of Captain Dawson, R. E., of the Tithe Commission, for the means of making the following statement of the nature of these maps, and an estimate of the extent to which they may be made available for the purpose in view.

The maps now in the hands of the Tithe Commissioners, and sanctioned for use under the Tithe Commutation Acts, are of two classes. The first class includes all the maps which have been made from original surveys undertaken for the purposes of the tithe commutation. These are all laid down upon a scale of either three or four chains to the inch. Their number exceeds 2200. The maps of the second class are township or estate maps, which existed prior to the commutation of the tithes; and having been found sufficiently accurate for that purpose, have been adopted by the parties concerned, and (after due examination) sanctioned by the Commissioners. These are generally laid down upon the scale of six chains to the inch, being that most in common use, and also that which your Committee are of opinion (as above stated) will be found best adapted for describing the rural districts in the proposed general map. The number of these second class maps now in the Tithe Office is upwards of 7200. It is supposed that about two-thirds in number, or 4800 maps of the second class, and the whole of those of the first class, are capable of being adapted to the present purpose, as being in every respect sufficiently complete and accurate, and admitting of ready combination with any new survey of the remaining districts. The whole number of the maps now so available is therefore estimated at 7000.

As no statement exists of the extent of surface embraced

by these maps, the only method, apparent to your Committee, of ascertaining so important a point, short of an examination of them all, has been to ascertain, with some degree of accuracy, the average content of a single map, and apply that to the whole. For this purpose 1500 maps, including portions of forty-eight out of the fifty-two counties of England and Wales, have been examined; and the result gives 2500 acres as the average content of each map. It follows that the 7000 maps above mentioned may be expected to include an aggregate surface of 17,500,000 acres.

In reference to the saving to be effected by adopting these as a portion of a general survey, it is to be observed that this would not amount to the whole cost of the existing maps. The lines to be measured across the districts already surveyed, in order to ensure an accurate combination of the existing surveys with the rest, would require an expenditure which is estimated at a penny or two-pence per acre on the contents of the maps adopted. Assuming for this purpose, as a general average, an expense of a penny-halfpenny per acre, the cost of surveying and mapping the rural districts, above stated at 1,087,500*l.*, would be reduced by the adoption of these 7000 tithe maps alone to 556,250*l.*

The operations of the Tithe Commission are, however, still incomplete. When finished, your Committee are led to anticipate that the number of sufficient maps may be increased from 7000 to upwards of 9000.

Your Committee also cannot doubt that, in carrying the general survey now proposed over the rural districts untouched by the Tithe Commission, or the tithe maps of which, though accepted for the purposes of that commission, would be found not adapted to form part of the general map now contemplated, a proportion of existing maps, from recent surveys, fit to be adopted as a part of the general survey, would be met with, equal, upon an average, to that which has aided the labours of the Tithe Commission.

Upon these premises, your Committee venture to estimate the expense now required to provide a general map of the entire surface of England and Wales, of a description fitting it to be used as the basis of an improved method of transferring real property, as follows:—

Estimated cost of surveying and mapping 29,000,000 of acres, including the whole of the rural districts of England and Wales not uncultivated or unprofitable, at 9 <i>d.</i> per acre - -			£1,087,500
Add for the survey of 3,500,000 acres of uncultivated lands, at 4½ <i>d.</i> per acre - -			£65,625
And for the survey of 4,000,000 acres of unprofitable lands at 3 <i>d.</i> per acre - - -			50,000
			<hr/>
			115,625
			<hr/>
			1,203,125
Deduct for 17,500,000 acres, included in the above estimate, but already surveyed and mapped, at 9 <i>d.</i> per acre - -			£637,500
Less 1½ <i>d.</i> per acre for the cost of combining the existing maps with each other, and with further surveys - - -			106,250
			<hr/>
			531,250
Deduct, further, for 2330 other sufficient maps, likely to be furnished by the Tithe Commission when its operations shall be completed, 5,825,000 acres at 7½ <i>d.</i> (or 9 <i>d.</i> less 1½ <i>d.</i>) per acre - -			182,031
And for anticipated saving by the adoption of existing maps in the remaining districts — say one-third of the estimated cost (9 <i>d.</i> per acre) of surveying the remainder of the cultivated land (5,675,000 acres), and one-third of the total cost (115,625 <i>l.</i>) of surveying the uncultivated and unprofitable districts - -			109,477
			<hr/>
			822,758
Carried forward -			<hr/>
			380,367

	Brought forward	-	£380,367
Add the estimated cost of survey of the towns and populous dis- tricts as above stated		-	206,475
			<u>586,842</u>
And add 10 per cent. for contingencies			58,684
Total estimated cost			<u>£645,526</u>

Your Committee may here observe, that the use now proposed to be made of the tithe maps was fully contemplated in the commencement of the operations of the Tithe Commission. The expediency of effecting a general survey, at the national expense, engaged the attention of the select committee of 1837, appointed by the House of Commons to consider the best mode of effecting the surveys of parishes for the purpose of tithe commutation. That committee, however, deeming itself precluded from the full consideration of such a scheme, limited its report upon the subject to recommending that whatever maps were required “should be constructed on such a scale as will admit of their being combined, if necessary, into one general map.”

Your Committee, as before stated, have deemed it proper not to enter here upon any further question touching the method or cost of the arrangements by which the map, so provided, might be best brought into actual use. These arrangements, besides the erection of a suitable establishment, the nature and extent of which must depend entirely upon those of the particular uses to which it should be deemed expedient to turn the map, appear to your Committee to involve, in immediate connection with its principal purpose, as stated in the reference before them, extensive alterations of the law of real property—alterations the intent and scope of which do not come within the limits of the present inquiry.

Among the most important and valuable of the purposes which, as it appears to your Committee, are likely to be served by the existence of such a map as that described in the reference, apart from the facilities it would afford to the

identification and transfer of real property, your Committee consider those chiefly worthy of immediate consideration are, — an improvement of the present system of local taxation, and the formation of efficient arrangements for the collection of agricultural statistics.

On the subject of local taxation, your Committee beg leave to refer to the admirably complete and lucid report upon the present system, its defects, and their remedies, prepared under the superintendence of the Poor Law Commissioners, and published in 1843.

It there appears that the local taxes levied and collected in England and Wales are of upwards of twenty different descriptions, and are legally applicable to nearly two hundred different purposes. That they are practically incident only upon real property. That the aggregate amount annually collected and appropriated is nearly 9,000,000*l*. That no less than fifty-four different species of officers are engaged in assessing, collecting, levying, and keeping accounts of these taxes, of each of which species there are often several in each district. That the total number of such officers cannot be less than 180,000. That being chiefly annual officers, serving without pay, there is scarcely any degree of regularity or certainty in their proceedings. And that the general result is much waste of time, labour, and money to all concerned, and a difficulty, amounting almost to an impossibility, of imposing the burden of local taxation in a fair and impartial manner.

Your Committee conceive that the construction and use of the proposed map might be readily combined with any attempt the legislature may think proper to make to remodel and improve the existing system of local taxation.

The propriety of instituting, in this country, some efficient method of ascertaining, from time to time, the general state of agricultural production, particularly the breadth of land in each district sown annually with wheat and other grain, and laid down for other crops, as well with a view to diffusing among the mercantile classes a knowledge of the prospects of the country in reference to its supplies of food, more trustworthy than has hitherto been gathered from vague and

unauthorised rumours, as in order to save both the grower and the consumer from the ruinous consequences of the false estimates sometimes founded upon such reports, appears to your Committee to be so obvious, as scarcely to need enforcing. And they conceive that any plan for effecting such a purpose would be very materially aided by the existence of the proposed general map, and might even, to a great extent, be effected with the very machinery requisite for applying the general survey to other purposes — as, for instance, to the levying and collection of the local taxes.

In conclusion, your Committee are of opinion, that, independently of the particular uses first above stated, a general survey, including the whole of the cultivated and inhabited districts of the country, could not fail, in various ways, to facilitate the business of legislation; to render more easy and rapid the administration of justice in all cases affecting the land, and to lead to a more perfect execution of the administrative business of the government in all its departments, but particularly in reference to matters of a local nature.

ART. X. — CONVEYANCING REFORM. — IRELAND.

Observations on the Evils resulting to Ireland from the Insecurity of Title and the existing Laws of Real Property, with some Suggestions towards a Remedy. Dublin, 1847.

THE tenure of land in Ireland, the mode of holding and of transferring land in Ireland, and all those collateral questions which relate to these subjects, must form a principal subject of discussion in the parliamentary Session which has just commenced. What is a matter of urgent expediency in England becomes, in Ireland, a matter of necessity. In the former country the consideration of these subjects should not be deferred; in the latter it cannot. For many years all reflecting and disinterested persons have been agreed that great changes in the law of real property were necessary. These are now forced on our consideration by an awful dispensation of Providence. Propositions, which have

hitherto rested in books, to be read by a few benevolent or curious persons, now acquire a painful interest. The most cheerless of all the cheerless paths of law reform — real property reform, the learning as to which is a sealed book to all but a few, is now lit up in Ireland with a lurid glare, and both statesman and landowner turn to it as the road to the salvation of the country. The hand-writing on the wall has been seen in characters of fire, and speaks thus to the Irish absentee : — “ *God hath numbered thy kingdom and finished it. Thou art weighed in the balance, and art found wanting. Thy kingdom is divided and given to another.*”

Thus it seems about to happen that a cause, which, however righteous in itself, has long looked as dull and lifeless as the clods of earth to which it related, must come under general consideration ; and the government, be it Whig or Tory, Protectionist or Radical, which did not now effect the necessary reforms, so far as it is possible, would not only disgrace itself, but infallibly be put aside as unfit and unworthy.

Under these circumstances, we shall consider (our space will oblige us to do so too briefly) what has been already proposed on this subject, and we can draw but little distinction, with respect to remedial measures, between England and Ireland. The tenure of land is pretty much the same in both countries. There are no copyholds in Ireland ; but then, in that country, the tenure of long leaseholds for life, renewable for ever, exists to a much greater extent than in England. A registry, in a very defective form, is to be found in Ireland, which perhaps is worse than none at all. On the other hand, the system of conveyancing is far more complete in England than in Ireland ; the black art is here better understood ; titles are in a much more satisfactory state ; deeds are, without a doubt, shorter and better drawn, and there is a greater uniformity in practice. But the measures which we shall propose will apply very generally to both countries.

We apprehend, then, that all that class of measures which are purely voluntary or permissive, the object of which is to allow the owners of land to improve the land, and turn it to

the most profitable use, will at once be agreed to by all parties.

But before alluding to these, we wish to come at once to what is the great grievance connected with the present law of real property as it exists both in England and Ireland. It is that part of it which relates to the titles to land.

Here it may be well to observe, that, although the changes which we wish to propose are very considerable, so far as the machinery of the law is concerned, yet that these will alter but little, if at all, the principles of the law of property. We do not propose to alter the power which the law gives over property to transfer or devise it by deed or will; it is only to the *mode* by which that power is exercised that we would call attention. The rules as to descent, the rules as to the enjoyment of freehold land, are simple and well known to all, and these we wish to leave untouched. We are anxious, indeed, to alter as little as possible, and that the alterations should harmonise as much as possible with that part of the law which is left unaltered. We believe that a few bold but simple alterations would remove the iron bonds which now fetter the alienation of land, and would, at the same time, disturb none of the familiar rules respecting it.

Let us now then turn to the existing practice respecting the *titles* to land. Unless we can remedy this, we shall never arrive near to the desired result, — “free trade in land.” Shorter and more simple deeds, uniformity of tenure, the clearing the land from the mouldering remains of the feudal system, a general map of lands, ‘are all excellent things, and we are ready and anxious to support them all; but they are altogether insignificant in comparison to that which we now wish to bring under our readers’ notice, — the simplifying the title to land, the giving every one the power readily to acquire and readily to part with his land, and not only readily but safely. The want of power to do this is the great grievance under which our land now labours: this it is that most of all decreases, and in many cases destroys its value: this it is which, increasing every day, has now got to such a pitch as most seriously to injure property, and which presses so hardly on small pieces of land as frequently to render them un-

saleable. This state of the law, to the positive detriment we believe of every one concerned in it, acts in reality on land after this fashion,—It lessens its value as effectually as if it cut a piece out of it. Thus, if a man have 100 acres, it may be said to take away sometimes ten, sometimes twenty, and sometimes fifty acres, when he comes to part with it.

What, then, is the language of the law, or rather of the profession, to the landowner? It is this: Before you can dispose of your land, either by sale or mortgage, you must show a *sixty years' title* to it, as it is called; that is to say, you must show the whole of the transactions and dealings respecting it for at least that period of time, and you must show that all the incumbrances which have affected it during this period have been paid off. You must verify all the facts connected with it, as births, deaths, &c., by legal evidence, and you must show that either you or those over whom you have control can convey to the purchaser or mortgagee every particle of what are called the legal and equitable estates. Now, mark, you must do this in case of a sale, although, having 1000 acres, you wish only to sell one acre. (A case came the other day to our knowledge, where the price of the land was 150*l.*, and the inquiry into the title, under favourable circumstances, cost 50*l.*) You must do it in the case of a mortgage, whether you want to borrow the money for a long or a short period; whether you want to borrow 100*l.* or 10,000*l.* Those of you who now borrow money on your land, think you get your money for 4*l.* per cent. or 5*l.* per cent., but if the expenses of the investigation of the title, which are always paid by the mortgagor, are added to your interest, on what terms do you suppose you really obtain your money? Is it not frequently at 10*l.* per cent., or even more, and this on the best security that can possibly exist? But your mortgage-money is called in; what happens then? The same investigation of title usually takes place by another person, the same, or nearly the same, expense is again incurred. It is easy to see how this state of the law must affect the value of land, and more especially the smaller proprietors of land. But this is not all. The greater the necessity of the man, the greater the number of his mortgages; the more his

necessities thicken around him, the longer, and thus the more expensive, becomes his abstract of title; the less he can afford to pay, the more he has to pay; the more money that he wants, the less finds its way into his pocket. To those familiar with the perusal of these abstracts of title, how sad a history do they frequently tell. First, we start with a purchase or a descent to some good yeoman or tradesman; some twenty years afterwards a *mortgage* becomes necessary; then shortly afterwards comes a *further charge*; then a *transfer*; and next, not unfrequently, a commission or a fiat of bankruptcy. Here, then, is the solid, substantial evil under which the landowner suffers.

It is not to be supposed that one so intolerable has been endured without a struggle. It is to be remembered, however, that it has only recently become so oppressive. Our forefathers felt it much more lightly, and we may now advert to the recent attempts which have been made to get rid of it or to evade it.

First: This state of the law forces many persons to complete their purchases and mortgages *without any inquiry into title at all*. Resting on the good faith of the seller, his covenant for quiet enjoyment, the character of the attorney employed, or the good fame of the neighbourhood, the parties agree to dispense with all abstracts of title, and encounter all the risk. This is certainly one way of getting over the difficulty, but can hardly be said to be a very satisfactory one; for, supposing a purchase to have been thus made, and the purchaser wish to sell again or mortgage his land, he is precluded from doing so unless he can find a man to deal with equally willing to run blindfold into the transaction.

Secondly: The public and even the professional feeling against this practice is shown by withdrawing property as much as possible from within its reach. Thus with respect to leasehold property, it has long been the usual practice of the profession to restrict the lessee from looking into the title of the lessor, even although the lease be granted for so long a period as ninety-nine years. The parties know full well that an inquiry into this title would be sometimes a dan-

gerous, and always an expensive operation, and thus it is that very large sums of money are invested in this way with great safety ; and thus, also, it happens that property so circumstanced is much more easily transferred, and bears relatively a much higher price in the market, than freehold and copyhold land. But it has recently been the practice to convert another very large class of property, which is in fact real estate, into personal estate, by act of parliament, in order to avoid the rules applicable to real estate, and this, be it observed, at the certainty of exposing it, on the death of the owner, to probate, or administration, and possibly legacy duty: We mean the shares in Railroad Companies, Mining Companies, Canal Companies, and other interests which are clearly interests in land. Now mark the consequence of this. These shares are transferred nearly as easily as stock in the funds : free trade exists in shares, and these pass readily from hand to hand. This is also pretty good evidence that there is nothing in the nature of land in this country which prevents its being so transferred. This result is accomplished by the act of parliament creating the company.

Thirdly: In many recent sales by auction and private treaty, conditions of sale are introduced which restrict inquiry, and provide for the difficulties attending the complete investigation of title. These are often a trap for the unwary, and they especially show the absurd and disgraceful state of the law. They assume that a perfect title cannot possibly be made out, and although usually connived at by the courts, yet they are clearly an attempt to evade a rule which is found in practice to be destructive of its object—the benefit of the purchaser.

But, *fourthly*, it should also be noticed that by the last statute of limitation (3 & 4 W. 4. c. 27. s. 17.) it was enacted that no action should be brought beyond forty years after the right of action first accrued, and it was then thought by some that it would in most cases be sufficient to show a title of forty years only, and this was the opinion of so eminent a lawyer as the late Lord Chancellor of Ireland.¹ This opi-

¹ Sugden on Vendors, vol. ii. 10th ed.

nion was however overruled by the bulk of the profession, and the practice has continued to require a sixty years' title, which has been sanctioned by Courts of Equity.

But when once the ingenuity of man is applied to evade a law, and that evasion is tolerated by a court of justice, the law, we may be sure, cannot last; and this is shown more peculiarly in the history of our law of real property; and we venture to predict that this law, as to title, is doomed; for not only is it intolerable as to delay and expense, but we will now show that it is this rule that renders or has rendered many titles in the kingdom *unsafe*.

We will soon satisfy the reader that we are not alarmists in using this word.

The best title in the country may fall under the investigation which the law at present sanctions. A man and his ancestors may have been in undisputed possession of his estate for centuries, and on coming to sell it or incumber it he may find that he has what is called an *unmarketable title*. Nor is a man much, if at all, better off who has recently purchased his estate after a most careful examination. When his turn comes to submit it to scrutiny a defect may be found which had escaped all previous investigation. For as there is, we suppose, no human body without some trifling defect or ailment, so there is no title which has not some flaw or defect; and as there are doctors for the one, peculiarly skilful, who have devoted all their lives to the diseases of a particular part of the body, so there are gentlemen who belong not only to a separate branch of the profession, whose business it is to investigate titles, but there are some who are especially learned on different sorts of diseased or defective titles. In a book, written by a very learned and painstaking conveyancer¹, now dead, we find this well expressed:—

“All such doctrines of the law,” he says, “as have become no longer necessary as rules for cases in which there must be some rule, or as part of the requisite *system* of the law, or as furnishing principles for reasoning upon novel or unfamiliar combinations, and which therefore merely belong to the requisite learning of the

¹ Park, *Contre Projet*, p. 12. (1828.)

law, must operate as so many concealed traps for the transactions of the community, and for the practical lawyers who conduct them. It is impossible that any lawyer can know them all, *but one will know a part and another will know another part*, and the consequence will be, that all through the community one lawyer will every here and there be finding out the oversight of another lawyer, *i. e.* his ignorance of some of these rules, *and hence, in sober truth, arise, in matters relating to property, some nine-tenths of what is properly called LITIGATION, and of miscarriage in legal transactions."*

And what follows is more important :

"What also, in point of fact, are most of the *defects of title* which occur in modern practice to the frequent obstruction of the most desirable purchase, but the result of the application of one mind to the examination of a title which commands a greater number of the abstruse and obscure doctrines of law, than some other mind or minds which were before in the preparation of the instruments, or in the deducing conclusions from the facts which constitute the title. It is not, perhaps in the proportion of one per cent. that the discovery of actual fraud, or wilful usurpation of right (which, *morally speaking*, should constitute the only defects of title), are the causes of the rejection of titles by those who are concerned in investigating the safety of purchasers. It is not intended to be asserted that titles should ever be universally free from technical defect, because there always will be ignorant and careless practitioners, and because the number of rules always must be greater than any but the most capacious intellects can embrace and apply. But in the present state of the law, a defect will often be discovered in a title, or an oversight in a transaction, after it has passed the previous ordeal of lawyers of unquestioned learning and diligence. *This is certainly a fearful condition of things for the owners and purchasers of landed property, and such as ought not to exist, if it be possible to protect them from it, without increasing the evil more largely in some other direction."*

But these pertinent remarks were occasioned by the observations which fell from one who, although ever alive to the defects of the law, was not so willing to amend them. In Lord Chancellor Eldon's judgment in the celebrated case of *Cholmondeley v. Clinton*, his lordship said :—

"My lords, that deed bears date on the 2d of April, 1794, and it makes me tremble, or should make your lordships of great property tremble, when you look at this deed if the parties turn out to be mistaken. You have here a gentleman made tenant to the præcipe, whom my noble friend and I recollect to have been a man of great knowledge in his profession, and we have the opinion of the late Sir Alexander Macdonald, and of as complete a conveyancer as existed in our time, the late Mr. Shadwell, before whom the case was laid; but if it turns out that mistakes have crept in, it is a case that has travelled through circumstances that almost any man must be frightened for fear his instrument should not operate according to his intention."

The great difficulty of the present practice of conveyancing is this,—that any title in the country which comes into the market is exposed not only to a rigid examination, but often to what we may venture to call a fanciful or hypercritical objection, which may, according to the niceties of practice, render it unmarketable. If there be a doubt on the point, although only two men may entertain it, and these two men admit that if this doubt came before a court of justice it would be overruled, yet this is usually sufficient to defeat the transaction. But we will mention one or two other authorities for our statement. "No title," says the late Mr. Tyrrell¹, "can be considered at present to be perfectly safe. After the evidence which can be obtained has been investigated with the greatest care, and every possible means of finding objections to it have been resorted to, there will still remain some possible cause of insecurity which no vigilance or ingenuity can discover." And again (p. 173.) he says: "The expense of proving and investigating titles is augmenting every day with the increasing length of abstracts. If a title be shown for sixty years, it will usually be found that the part of it which relates to the last twenty years exceeds in length the part which contains the title for the preceding forty years." And again (p. 168.): "The expenses and delay attending the alienation of real property is a greatly increasing grievance, and the acknowledged impos-

¹ Suggestions on the Law of Property, p. 168. (1826.)

sibility of ascertaining the safety of titles occasions great difficulty in selling and mortgaging estates, which diminishes their value." And again: "The trouble and difficulty of proving facts and making searches are increasing with the population of the country and the business of the courts, and if some means of diminishing the expenses of producing, proving, and investigating titles, which are now very burdensome, be not afforded, they will become enormous." Another early and valuable labourer in this field, the late Mr. John Miller¹, quotes these observations of Mr. Tyrrell's with full concurrence and high praise, and adds the following: "The saving to the public in purse, as well as pain of mind, which good remedial provisions effect, far exceed the estimate of this usually formed. I have heard from authority, on which I think I can rely, that the saving in the transfer of real property effected by the acts recommended by the Real Property Commissioners most likely exceeds 100,000*l.* a year; and that the saving effected by the Wills Act will be at least equal to as much more." To this, perhaps, we may add, that the saving effected by the abolition of the lease for a year has been computed at 50,000*l.* at least, and that effected by the act abolishing outstanding terms at 300,000*l.*

We have now shown that the opinions which we have ventured to state on this subject have been long entertained by many of the highest authorities on the subject. And we have recently² called attention to the fact that these opinions have at length been fully recognised by the legislature, and that the Select Committee on the Burthens of Land has declared the necessity of "the improvement of the law of real property, the simplification of titles and of the forms of conveyance, the establishment of some effective system for the registration of deeds."

We now wish to allude to the most important event connected with this subject since the last session of Parliament. This, it appears to us, was the great public meeting held at

¹ Miller on the unsettled State of the Law, p. 53. (1839). It may be well to observe that the political opinions of all the gentlemen whose works we have cited were Conservative.

² See 4 L. R. 385. *et seq.*

the Rotunda in Dublin, on Thursday, January 14 last, and attended by most of the leading noblemen, members of Parliament, and landowners of Ireland. We select only that resolution which bears on our present subject, for we have nothing to do with the other objects of the meeting. It is as follows:—

“That to diminish the enormous expense and delays that now exist in these matters [the management of estates] cheap and simple modes should be devised for the transfer, partition, and exchange of landed property.”

This resolution was moved by the Right Honourable R. Tighe, Vice-Lieutenant of the County of Kilkenny, who said, that if they passed this resolution, the landlords would have the means of relieving their tenants. It would also preserve their property to them. It was seconded by Mr. Cahill, J. P., and also a barrister, who observed,—

“It was said of the landlords of Ireland, Why don't they part with the properties which they are unable to retain? Simply, because the present state of the law,—its long delay, its enormous expense,—make it totally impossible to sell a part, and most difficult to sell even the whole property (hear, hear). It is our duty, therefore, most earnestly to press on the legislature to facilitate and cheapen law proceedings in general, but more especially the transfer of property (hear, hear). It would get into hands that would improve it; new vigour, new life, new capital would be infused. Instead of the present most expensive process, by which a fine property is often reduced by costs to a mere skeleton, I would propose (and it is a principle already recognised and acted on with great success in railway cases), that Parliament should pass a law declaring every title, with a few exceptions, which is set up, duly advertised, and sold for the full value to a *bonâ fide* purchaser, should be a good title. This may appear startling to gentlemen who have not considered the subject, but no person will be injured by it. Let parties interested follow the money in court, which represents the land (hear, hear). If they have any claim, the money is there: the property would thus sell for

the full value, and would not, as is often the case, be sacrificed on account of some trifling flaw in the title; and both the owners and the community would be greatly benefited by the transfer of property to other more enterprising hands. In order also to facilitate in every way this desirable object, why not make use of the present local courts? They are found to work most usefully: attach to them Registration Courts for the transfer of property. One of the most desirable objects to the community at large and to creditors in particular, as they would then realise more money, would be to divide and sell in lots overgrown properties. Thus a most useful middle class of proprietors would spring up, and farmers who now have some money (a very numerous class too) would be enabled to purchase their own farms (hear, hear). At present this is almost practically impossible, as a separate title at great expense would have to be made out at each purchase, the charges for which are enormously expensive (hear, hear). Have one common title registered in the local courts at a cheap rate, and let every party purchasing refer to that simple title; without this or some similar simple machinery for the transfer of real property, you will never effect the object of this resolution, so highly important to the community." — (Enthusiastic cheering.)

This speech may be of no great importance in itself, but when we find that it was exceedingly well received throughout by this great meeting, consisting of all parties, and composed of a great number of the large landowners of Ireland, it appears to us worthy of great attention, and we believe that the same sentiments would have been equally well received in any meeting of landowners in this country. Let it be remarked that it proposes a summary and violent remedy.

We are now desirous of stating our views as to the remedies for the evils which we have described. We need not say that they must be adequate to an occasion which demands great alterations to be made with a firm and unshrinking hand. These are:—

I. *A Registry of Titles.* — Whether this Registry should

be a Metropolitan Registry or a District Registry, or whether it should be a combination of these, we need not now particularly discuss. We have very recently given our readers a full opportunity of acquainting themselves with the more recent plans on this subject.¹ We cannot overstate the importance of the choice as to them being a correct one. For many reasons we do not think that either branch of legislature, or a committee of either House, is the best tribunal for making the election. No further evidence is wanted of its being an advisable, and indeed an indispensable measure. All parties and all branches of the profession are now agreed as to it.² A certain number of competent men should, therefore, be deputed to *draw the Bill*, and we believe that there will be little difficulty in carrying it.

It may, perhaps, be said that Ireland has a Registry in actual operation. This is indeed true, but the sooner it is placed on a sounder footing the better. This is, we apprehend, also admitted by all. A Bill for this purpose was drawn under the direction of Lord Devon's Land-Tenure Commission, but never brought in. We have some reason for supposing, although no authority for stating, that this Bill, with several others relating to property, was brought in by Mr. Morgan John O'Connell at the end of last session. At any rate a new Registry Bill has been brought in, which is pretty good evidence of the unsatisfactory nature of the present system of Registry, in which the vital defect exists of a *bad index*.

This is also shown by the recommendation as to this contained in the pamphlet, which we have placed at the head of this article. Alluding to Mr. Stewart's sketch of a plan, the outline of which we have already laid before our readers;³ the writer says, "that it appears to afford means not only for facilitating and cheapening transfers, but also for giving perfect proof of titles; as it is only needed for this purpose to require that all mortgages, and all other acts or deeds

¹ 4 L. R. 336., and see *antè*, 339.

² We have a right to say this, because during the last two or three years there have been many recommendations of this measure, and there has been no answer even attempted to the arguments in its favour.

³ *Antè*, p. 214.

affecting the property, shall be registered in the same book of registry, in such a manner that they may be apparent to every one inspecting the registry." (p. 24.) We, therefore, make no distinction in this between England and Ireland, but call for an effective Registry of Titles for both countries.

2. *Short Deeds.* — The efforts made in this direction have not been without their use. They have, in fact, been attended with much more success than at a first glance may be supposed. They have influenced many persons in spite of themselves. The acts 7 & 8 Vict. c. 119. and 7 & 8 Vict. c. 124. were the first legislative blows aimed directly at the long forms used by many practitioners. They were passed with the view of placing a legislative brand on verbosity and tautology. It is said, however, that they have not been acted on by the profession. This it is impossible to discover, until the dark unfathomed caves of practice shall give up their contents. Certainly some instances have come to our knowledge where practitioners have positively refused to act under them, without assigning any better reason than the monk mentioned by Dr. Bentley.¹ Be this, however, as it may, when it is said that they are not used, it is meant that the conveyancer does not use the words, "This indenture made in pursuance of an act, &c." But is there no other way of acting under them? Is there no other way of carrying into effect willingly or unwillingly the expressed intention of the legislature? Are they entirely unattended to, and set at nought, *if in fact deeds are generally shorter since these acts came into operation.* There are almost always two modes in which statutes operate, directly and indirectly, and the latter mode is often more important than the former, and this may be the case in this instance. There is no doubt, we think, that since these acts were passed the profession have been under their influence without always knowing it. No man now sits down to draw a draft without having the dread of verbosity in some way present to his mind. Books of Pre-

¹ Dr. Bentley mentions a priest, who for thirty years together had read *mumpsimus* in his breviary instead of *sumpsimus*, and when a learned man told him of his blunder, "I'll not change," says he, "my old *mumpsimus* for your new *sumpsimus*."

cedents now blazon in their fronts 'conciseness' as their main charm and advantage. Many persons with a sincere design to avoid the letter of the act are obliged to attend to its spirit, which is far more important. We were never great sticklers for the particular plan of these acts. We took them as a means to an end, and we do not approve at all of forcing their adoption on the profession. Indeed we are quite willing to admit that there is among the bulk of the conveyancers a fair disposition to aid the legislature, and that a great deal may now safely be left to themselves. Still something remains to be done. Even were we quite sure that the will always exists to make the proper alterations and to use the requisite conciseness, the ability, the necessary skill, may reasonably be lacking; and besides this, all practitioners may not choose to take on themselves the responsibility which an alteration of existing forms involves, without positive legislative authority. We conceive, therefore, that the profession is now itself desirous of some farther legislation in this direction.

While we say this we are anxious to give full credit to those disinterested and honourable members of the profession who have long ago brought their best faculties to the shortening our deeds. Let us give full praise to the "Concise Conveyancers," of whom Mr. Hayes has been at once the earliest and the most eminent. But we think that individual efforts are not fully sufficient: however powerful the particular arm may be, it is not quite strong enough to fight against a host. The omnipotence of Parliament is necessary to complete the work.

3. *The compulsory enfranchisement of Copyholds.* — This applies exclusively to England, Ireland not being cursed with this most inconvenient and barbarous tenure. We only refrain from entering at length into this subject, from the belief that all are agreed as to the necessity of the introduction, as soon as may be, of the compulsory principle in dealing with it. The Report of the Select Committee of the House of Commons of 1838 on this subject, concludes with this passage: — "Your Committee look forward with confidence to the speedy and entire abolition of this tenure, as a means of

greatly simplifying and improving the law relating to real property. They earnestly desire that measures may be speedily taken to effect this object, with reference as well to lands of customary as of copyhold tenure: it appears to them that the best mode of effecting it would be by giving every facility to enfranchisement for a short term of years, and that after that period the enfranchisement should proceed on the compulsory principle." The Commissioners appointed under the Copyhold Act, brought in in pursuance of this Report, in their last Report (1846), whilst they state that the number of enfranchisements had greatly increased, say that "it would be a public benefit if the legislature were to cause a compulsory extinction of some of the copyhold incidents, more especially of heriots." Some time has now elapsed since the Commissioners were appointed; during that period they have been acquiring the information on which they can safely and properly carry a compulsory measure into effect, and we cannot doubt that some step in this direction will be taken in the present session.

Having mentioned this measure as peculiarly applicable to England, we will now allude briefly to some measures which are stated as necessary for Ireland, which, without giving all of them our approval, we think it proper to bring at the present time before our readers.

"1st. That all leases for lives renewable for ever should be converted into perpetuities, an addition being made to the rent as compensation for the renewal fines.

"2nd. That all persons holding property in land or houses by leases in perpetuity, or by leases for a term of years, of which 300 years are still unexpired, should be entitled to purchase the fee of their property on equitable terms, on the principle already acted on as respects the quit and crown rents; say for a sum which, if re-invested in the funds, would produce an income equivalent to the rent received; paying to each of the landlords above them, if there be more than one, that sum which may be equivalent to the rent or profit-rent received by him.

"3rd. That in case of a mortgage on the property, the amount paid by the purchaser should be first applied in discharge of the mortgage debt, and the balance, if any, paid to the mortgagor.

" 4th. If the property were bound by settlements, so that the owner had only a life interest in it, that the purchase money should be paid into the Court of Chancery, to be invested in the funds for the benefit of the party having the reversionary interest; the dividends from such investment to be paid to the present owner during his life.

" 5th. That no difficulties respecting title should be allowed to interfere with the proposed right to purchase; but that in such cases the money should be lodged in court for seven years, and invested in the public funds; the party previously in possession receiving the interest on such investment during the seven years, and being entitled to receive the amount itself on the expiration of that period, unless his right thereto might have been questioned during the said term; the lapse of time, if no question arose, being deemed a sufficient proof of title.

" 6th. That the stamp duty payable on the transfer of property should be a small per centage on the purchase money, in order that no obstacle should be raised to the sale of property in small lots.

" 7th. That in all sales under the Court of Chancery, the property should be sold in lots corresponding to the actual tenancies in possession, in order that every tenant might have the opportunity of purchasing his own holding.

" 8th. That all future settlements should be settlements of *property on the persons, not a tying up of the land*, and should be effected by means of trustees, as in the case of personal property. The trustees to be at liberty to sell the property or any part of it; in short, to exercise the full right of ownership. The amount of any sales to be subject to the trust, and invested in the funds, or in other land.

" 9th. That in all existing entails, provision should be made for the sale of the land, if the present possessor find it advantageous to do so; care being taken to protect any one having a reversionary interest, as proposed in the 4th suggestion.

" 10th. That a District Registrar of land should be appointed for every barony, a County Registrar for every county, and a General Registrar for Ireland, (to have his office in Dublin,) and that the present holders of land or house property in fee should be entitled to register their freeholds in triplicate, in suitable books of registry; the various properties being marked out on maps of the Ordnance Survey, the registers having distinct reference to the maps.

"11th. That such registry, if unquestioned for seven years, should be full and complete proof of title for ever afterwards,

"12th. That all mortgagees should be entitled to have their mortgages registered in triplicate, in such books of registry; which registry should then become legal proof of the mortgage debt, and without which no mortgagee should be entitled to enforce his claim against the property.

"13th. That all circumstances as to settlement or entail in any way affecting the rights of the possessor of the property, should for the future be duly registered, to render them binding in law; the registry to be legal proof of the settlement, &c.

"14th. That any judgment or mortgage now existing against any landed or house property in fee, which should not be registered within the seven years next ensuing after the registry of the property itself, should become absolutely null and void, and should be no longer a lien on the property.

"15th. That all future transfers of property held in fee, all mortgages thereon, and all settlements and encumbrances of every kind, should be effected by an entry in the books of registry, with references to the Ordnance Maps corresponding therewith; the registry to be made in triplicate, on the lodgment of certificates duly signed and witnessed, in a manner somewhat similar to the mode of transferring stock at the Bank of Ireland; such entries of transfer, of mortgage, or of settlement, being made in triplicate, in the baronial, county, and general registers, and each of them becoming full legal proof of title.

"16th. That all persons should have a right to inspect such books of registry, and to take extracts therefrom, on payment of a small fee." — *Observations, &c.*

4. *Judgments.* — There seems good reason for relieving lands from the inconvenience of the lien of judgments. Every buyer of land is subjected to useless expense, and "sometimes to protracted litigation, (occasioning necessarily, though indirectly, a reduction of price,) for the purpose of giving a few judgment creditors a remote chance of reaching land upon which they have been unable or have neglected to obtain a direct charge. This heavy burden upon real property, while it tends to lessen the number of years' purchase for which land in England is saleable, differs from other burdens in being attended with no corresponding benefit to the parties in whose favour it is created. It appears

to me that it would be highly beneficial to return to the plain words of the statute, and to relieve real property from the lien of judgments with its attendant cumbrous and imperfect system of registration, and from all questions upon the effect of notice of an unregistered judgment, and all difficulties as to taking satisfied judgments off the file, by declaring that lands shall not be bound until the writ of execution has been delivered to the sheriff, and a minute thereof left with the Senior Master of the Court of Common Pleas, in the manner required as to judgments by 1 & 2 Vict. c. 110. s. 19.¹ ”

5. *A general Map or Survey.*—This measure, which is also very generally assented to, has been made the subject of a separate article.²

6. *Shortening Inquiry into Title.*—It has been suggested, that the practice under Railway Acts, of paying the purchase money into court when any delay or difficulty takes place, and shifting the conflicting claims on the land to the fund in court, might be safely extended to other cases. Our readers will see the general clauses in 8 Vict. c. 18. ss. 77, 78. This plan, it is to be observed, was proposed with apparent approbation at the Great Irish Meeting of Landowners,³ but seems to us exceedingly questionable where the sale is not compulsory.

We have then next to inquire, as to how all these plans and projects are to be dealt with. What steps should be taken to forward them? Of course, when they assume the shape of bills, they are, at all events, ripe for discussion both in Parliament and out of it. But many of them have not yet got this length, and when they have, our readers are well aware that, although Parliament is competent to decide on the principles of measures submitted to them, it does not follow, that they form the best possible tribunal for determining on its details. Who, then, shall decide on all these plans and suggestions, and many others before the public? Who shall determine, sup-

¹ Serjeant Manning's Proposal for the Amendment of the Law of Bankruptcy, p. 37.

² See Art. IX.

³ See *antè*, p. 408.

posing all, or any of them to be worthy of attention, as to the order of proceeding with them? Who shall say which is mature and which is immature? We know not how all this can properly be done, except by the appointment of some competent authority. And here again recurs the want which is felt so often of a MINISTER OF JUSTICE in this country: admit that one Chancellor is both able and willing to act in this capacity, the next declares that he has neither the ability nor the inclination. All, then, is left to hazard,—to personal inclination. But in the absence of such a Minister of State, it has been the practice of the constitution to delegate his power, for some special purposes, to Commissioners,—a name sounding somewhat distasteful to some, but from necessity constantly resorted to.

We have long thought that, following the suggestion of Lord Bacon, the amendment of the law should be entrusted to a Permanent body of men.¹ But if this be considered too strong a proceeding, surely there never existed a better case than now exists, for appointing a temporary Commission; and yet this course might be made that which would be, of all others, not only the least advisable, but the most fatal. If the questions now prominently before the country were to be *shelved*, or if they were to be committed to the keeping of lukewarm or incompetent friends, far better would it be to

¹ In the last No. of the "Edinburgh Review," a Permanent Revising Board for Bills is recommended: the Reviewer says: "Merely practical lawyers are often consummate in the art of applying positive principles; but not being called upon by the nature of their avocations to conceive the law as a rational system, they could not conceive the comparatively simple expression to which it really may be reduced. Merely theoretical lawyers are equally incompetent to the business, as wanting a sufficient acquaintance with the details of the law, and that dexterity in applying principles which nothing but practice can impart. The Members of a Commission of Legislation, composed as we have suggested, would possess the minute knowledge and practical dexterity which are naturally acquired by experienced lawyers; and, from the nature of their office, they would as naturally combine with these faculties a faculty of a higher order. Their office would give them the talent of conceiving the details of the law, as forming the related parts of an internally coherent whole. And *this* talent, combined with minute knowledge and practical dexterity, is *the* talent needed for the work of reducing the law to a Code." — *Edinburgh Review*, Jan. 1847. p. 257.

leave them as they are, for while the wounds are open and bleeding, we are sure that sooner or later they will be stanchd. At the commencement of this inquiry a Commission, constituted as the Real Property Commission, was the only step that could properly be taken. It received the very general consent of the profession: it collected much useful information: it stirred up the whole question: it accomplished a good deal, and proposed much more. But a Commission so constituted, we are confident, would now satisfy neither the public nor the profession. We give the greatest credit to the members of that Commission, who fairly did their best, and who might again do all that could or should be done. But the public must be satisfied from the position of the persons composing the Commission, not only that professional prejudice and interest would not stand in the way of the necessary reforms, but that they could not. Technical learning and practical habits must be fully represented in such a commission, but they must not have a preponderating influence. If, therefore, there were a chance that the proper principles would not have fair play in such a body, far better would it be that there should be no such commission at all. It is quite possible that all sensible and experienced men would recommend the same measures; but then it is so important that this should be done, that all suspicion as to motives should be removed. We have now, however, no fear that this subject will not attract proper notice. We can hardly take up a newspaper without finding some allusion to the law of real property either in this country or in Ireland. It is now not the hobby of a few benevolent persons: it has become a matter of national importance, and it *must* receive the necessary attention; and of this we believe the Government is fully aware.

We may here notice an interesting article in the last Quarterly Review (December). We are glad to find that in this influential quarter the necessity of a "general registry of *titles*" is admitted, and a trust expressed that "we have not much longer to wait for that reform" (p. 221.); and further, that the writer is of opinion that a general survey of the land, "fully equal to that of France, would be both useful

and practicable." (p. 233.) But in some parts of the article we are surprised to find an attempt is made to confound that proper and beneficial division of land which would arise from giving greater facilities to its transfer (and as to the benefits of which we thought all were agreed) with the forced and unhealthy division of land which takes place under the operation of the law in France, which not only abolishes primogeniture, but regulates the mode in which a man's land is to be divided after his death, with which it obliges him to comply. Now, we are also opposed to the introduction of such a law into this country; but we must be careful not to attribute the effects which arise from such a law, thus *compulsorily* dividing the land, to the law and practice existing in France (to which we have already called attention) which enables parties who wish to transfer and mortgage their land to do so cheaply and easily. A law which would allow a cheaper and less hazardous dealing with land would be most beneficial to all classes. In calling *all* the plans which have lately been brought before the public for bringing about a greater distribution of real property, "insidious and revolutionary" (p. 237.), probably the writer means to allude only to those which propose the abolition of primogeniture; for if he alludes to the plans which have simply for their object the reduction of the present expense and uncertainty which now attend all dealings with land, it would only be necessary to point, not to semi-republican France, but to monarchical Prussia, to despotic Austria, and the minor states of Germany, in all of which a system of dealing with respect to land has been long in operation, cheap, simple, and safe. We apprehend, therefore, that the writer's observations must be so confined. Our own objects in this behalf cannot be better expressed than in the resolution of the Land Burthens' Committee of last session, which will hardly be considered "revolutionary." "The improvement of the law of real property, the simplification of titles and of the forms of conveyance, the establishment of some effective system for the registration of deeds." We are as anxious as they were "to impress on the House the necessity of a THOROUGH REVISION OF THE WHOLE SUBJECT OF CONVEYANCING, and the disuse of the present prolix, expensive,

and vexatious system." (p. xiii.). These strong expressions, and many others to be found in the Report, cannot be easily effaced from the recollection of the members of the committee¹, the other members of the legislature or of the public. There are indeed in this article some expressions which would seem to throw a doubt on the axiom hitherto, we apprehend, universally received in political science; that although the transfer of property whether real or personal, may not be in itself beneficial to the state, yet that the more complete power there is to transfer it, if the owner wishes to do so, the more beneficial is it both to the state and the owner. We think it necessary at present only to assert this to be so until some arguments are given us to the contrary. At present the only one, which is rather vaguely insinuated than stated by the reviewer, is, that if the power of transfer were more free, improvident transfers would take place, and that some check is necessary: but why does not this equally apply to goods and chattels? Jewels and bales of cotton, and stock in the funds, may be parted with improvidently as well as lands; and why should the owner of the one be more protected by the law than the other? The prudence or imprudence of the transaction, we apprehend, cannot enter into the calculation of the legislature. That must be left to the individual. Besides, the writer should know that the existing law in no way protects improvident transfers. The *contract to convey* is now the affair of a moment. It is the carrying it into execution that requires time, but the party is equally bound whether this take a day or a year. The state is bound to provide a law easily understood, and adapted to carry out the common transactions of life with reasonable ex-

¹ The names of the Lords composing the Committee are as follow: (they will, perhaps, be surprised to find themselves characterised as "respectable and well-meaning men," having a bias towards *revolutionary* measures): Duke of Buccleugh (President of the Council), Earl of Haddington (Privy Seal), Duke of Richmond, Duke of Buckingham, Marquis of Lansdown, Marquis of Salisbury, Earl of Hardwick, Earl of Radnor, Earl of Clarendon, Earl of Malmsbury, Earl Grey, Earl of Stradbroke, Earl Lovelace, Earl of Ellenborough, Lord Dacre, Lord Beaumont, Lord Redesdale, Lord Dalhousie, Lord Colchester, Lord Brougham, Lord Stanley, Lord Ashburton, Lord Cottenham, and Lord Monteagle.

pedition and certainty, and at a moderate expense. By the present law a man often at his extreme need finds it a work of time and difficulty to borrow money on his land.¹ He wants every facility that can be given.

This article, however, contains one important fact: From the official accounts it appears that in the ten years from 1826 to 1835, the value of 934 millions sterling, or 59 per cent. of the territorial property of France, actually changed hands. Above 40 per cent. of these were changes by inheritance; 50 per cent. were sales, exchanges, forfeitures, &c.; about 10 per cent. were gifts (p. 213.). The writer says in a note,—“It is remarkable that the registered sales of personal property for the same period amounted to just half this sum, so that it would seem at first sight that the *immeubles* were more changeable than the *meubles*.” This greatly helps to establish what we have always asserted, that if the law as to the transfer of property were rendered more simple, the number of transfers would greatly increase. It is quite true that many of these transfers in France must have been made in the lifetime of the parties, to defeat the operation of the law as to the division of land on their death; but making a proper allowance for this circumstance, the number of other transfers must greatly exceed those in this country.

We regret, then, to see this attempt to confound things totally distinct,—conveyancing reform, with an alteration in the law of primogeniture, and the compulsory division of land

¹ An instance, by no means rare, recently came to our knowledge, of a city banker positively refusing to make any advance on a considerable unincumbered estate of undoubted value, of one of its customers, who had instant occasion for a sum of money. This could not exist in a well-ordered state of things, in which two points should be easily ascertainable; 1. the actual incumbrances affecting any piece of land; and, 2. its average value in the market, regard being had to the value of land in the neighbourhood. At present nothing more shows the unsatisfactory state of real property as the uncertainty as to its value in the market. While bargains in consols are calculated within one-eighth, no person can say what land will fetch. Our dealings are certainly made in the dark. It is no uncommon thing, the moment a bargain is completed, to hear a large advance offered to the purchaser. We heard very recently of a small estate purchased for 8000*l.* selling a month after for 13,000*l.* Here and there a man may gain by this, but it is a highly unsatisfactory state of things for the owners of land throughout the country, to whom a steady and certain market would be invaluable.

on the death of the owner. We believe that no one will be misled by this. There are a great many persons in favour of conveyancing reform,—there are very few in favour of any compulsory alteration in the law of primogeniture. To those who are for preserving this law, we would in all kindness address a word of warning. Take care what you do in opposing the necessary reform in the law of real property; take care how you attempt to check the efforts of those who wish to facilitate the legitimate alienation of property. If these are properly assisted and carried, you may preserve the law of primogeniture. The revision of the present system of conveyancing, to use the words of the Lords' Report, is all that is really desired. But if this desire is opposed and thwarted, an indiscriminate outcry against the law of property will be raised. The alterations will be made in ignorance and clamour, and in that hour the very first law which will be repealed will be the law of primogeniture.

It is, we are persuaded, without proper consideration that the Quarterly Review has allowed these expressions to escape. We have ever looked upon our contemporary as an active, useful ally in the cause of law-reform. Opposed to many constitutional alterations, it has been steady in supporting useful amendments of the law; and on this very subject we remember a most favourable review of Mr. Humphrey's book, in which a far greater alteration in the law of property than any that we support, was advocated. Nay, in this very number we have a stout recommendation of extensive reform in Chancery.¹

The proceedings in the present session have so far supported the views which we have brought before our readers, not only on the present occasion, but since the commence-

¹ This occurs *apropos* to a review and notice of a well-written and clever series of "Tales by a Barrister." These tales came out about two years ago, and fell nearly still-born from the press—read only by a very few, but by them admired and appreciated. They have now been thus kindly and judiciously brought into notice; but, alas! not till after the death of their amiable and accomplished author, Frederic Liardet, who, after passing about twenty years in the army, went to Cambridge, where he took a degree, and was ultimately called to the Bar. He died in Switzerland this last autumn.

ment of this work. In moving the address in the House of Lords, Lord Hatherton insisted on the necessity of giving greater facilities for the transfer of property, and even expressed a wish for an alteration in the law of entail. The latter opinion met no support in that House, but Lord Stanley entirely agreed with him in the former. Again, in bringing forward his plan for Ireland, on the 24th of January, Lord John Russell, among his other remedial measures, dwelt much on a series of Bills now in preparation, having for their object the facilitating the sale of land, and in this he received the universal concurrence of the House, and more especially that of Lord George Bentinck and Mr. Hume.

This appears to us so important, that we shall give some extracts from the speeches to which we refer. We quote from the *Times* of the 25th of January. Lord John Russell, speaking first of small holdings, says, "Let me say here that I do not think, so far as I have been able to form a judgment, that small holdings are a great evil in Ireland. I believe that the particular mode in which such land is held, has often been a source of evil in that country, but I do not think the small divisions have been injurious; and I am the more confirmed in this opinion by finding that one of the counties in which there is the greatest division—I mean the County of Armagh—is notoriously one of the most flourishing and best cultivated in Ireland." His Lordship thus went on: "Connected with the measures to which I have alluded, viz., those which are to enable proprietors to make a better use of their property, to increase their capital, and to improve their estates, we have under consideration a measure for facilitating the sale of encumbered estates. There are two modes in which this may be done. One is by adopting the general principle of the Copyhold Enfranchisement Act. Every one knows that bills are passed in every session to allow certain individuals to sell portions of their estates to enable them to pay off incumbrances. As one way of carrying into effect the principle to which I have just alluded, I would purpose that there should be a general law giving power to Commissioners to examine into each case

brought before them, instead of passing a private bill in each case, that a general bill should be passed in which should be included all cases. Another mode of obtaining the same object has been under consideration, and this was solely by the authority of the Court of Chancery, upon application made to it for that purpose. I cannot at this moment say which mode shall be preferred: all I can state is that the subject is under consideration. We shall likewise propose a bill by which those long leasehold tenures may be converted into freeholds."

Objecting to other parts of the plan, and especially to the reclamation of waste lands, "as one of the wildest schemes imaginable," Mr. Hume continues:—"He would candidly tell the noble lord, that if he would bring forward immediately two of the measures which he proposed to render subsidiary measures, viz. plans to simplify the titles to property, and to facilitate the sale of lands, he would confer a far greater blessing upon the Irish people than by endeavouring to reclaim the waste lands. He had seen to-day two persons, land-agents from Ireland, who assured him that any amount of land might be sold in Ireland, provided the titles could be made out easily, without expense." Finally, Lord George Bentinck declared "that, with respect to the facilities which the noble lord intended to give for the sale of estates, and for the conversion of long leases into freeholds, he looked at them with great satisfaction and admiration."

Here, then, is a point on which all parties are agreed; and all that is wanted is, that the government should take, if they have not already done so, the necessary steps for carrying into effect the general wishes of the country.

The writer of the pamphlet to which we have referred will best show the necessity for some measures, such as those to which allusion has been made, and will explain the reason of the general concurrence in them by those who have inquired into the state of the country.

"The principal causes of the bad cultivation of land in Ireland may be classed under two heads, *insecurity of title, and want of capital*; and these causes affect the land, whether we look to the

owner of the property—unable perhaps to prove his title, embarrassed by heavy mortgages, and bound up by settlements,—or to the pauper tenant in possession, holding his land at a rent which leaves him a bare subsistence, and without any motive for improving a property of which he has no certain tenure. There are certainly many instances of solvent landlords taking good care of their property, and also of tenants with well cultivated and improving farms, paying a fair rent, and having no fear of ejectment; and the good effects which are evident in such cases make the contrary evils but too apparent, in the numerous instances of insecurity and poverty. The similarity of these evils, and of their effects in the case of the landlord and the tenant, is so great, that it may be useful to exhibit them in parallel columns.

LANDLORD.

Title doubtful, or difficult to prove; so much so, as to interfere with the sale of the property.

Estate heavily mortgaged, or liable to a jointure, or payment to the younger members of his family; so that his nominal income is barely sufficient to pay the annual demands, and he has consequently no capital to improve the property.

Estate being entailed, or closely bound by settlements, he has only a life interest in it, and is therefore disinclined to expend money on improvements which will not be immediately remunerative.

TENANT.

Has no lease; or a lease at so high a rent, that being always in arrear, he is always liable to be ejected.

Is bound for a rent that takes all he can spare beyond a mere subsistence, and consequently cannot afford to improve his farm.

Having no certainty of possession, he will not of course give any labour, or expend any money for which he does not expect an immediate return.

“ The result of this state of things is such as might be expected. A country, naturally very fertile, is left almost unimproved, and only half cultivated; the fields are undrained; the rivers, left without care, overflow their banks, and turn good land into marsh; straggling hedges and uncultivated spots deform the face of the country; the hay or corn, insufficiently secured, is exposed to the weather; and much land capable of culture is left to its natural wildness, or is so ill tilled, that it is but little better than waste. Yet our summers are warm enough for wheat; our winters are so mild, that many plants flourish unprotected, which in England

require to be kept under glass; our natural pastures equal the most careful cultivation of other climates, and afford grazing to cattle almost the whole winter. This fertile but neglected land is occupied by an embarrassed gentry, striving to maintain the position in society to which their nominal income would entitle them; and by a pauper tenantry, multiplying to excess, outbidding one another in the ruinous contest for land, and at length resorting to lawless violence in order to retain its possession, as their only means of subsistence. The peaceful and industrious annually retire by thousands from the scene of contest, to exert, in the forests of America, the intelligence and energy, which, under more favourable circumstances, would have strengthened their country with a happy and independent peasantry.

"The evils resulting from settlements and entails may be regarded as arising from *insecurity or uncertainty of tenure*; because the possessor of the property is in reality not the owner; he cannot deal with it as an owner; he is merely a trustee for others; he has no interest in its future though permanent improvement, except so far as he may wish to benefit his successors; he can never reap the benefit himself; he cannot sell; he cannot dispose of a part, even though the alienation of a part might greatly enhance the value of the remainder; he holds it during his lifetime, as his predecessor has held it, unaltered, unimproved, to transmit it to his heir clogged with the same restrictions, alike injurious to him and to his country. This is the case of an unembarrassed landlord. But let us suppose, as is unfortunately too often the case, that he has received the estate encumbered under a settlement, with a jointure to the widow of the late possessor, and provisions for daughters and younger sons. In what difficulties is he at once involved!—this owner for life of a large tract of country, with a long rent-roll, but in fact a small property! He cannot maintain his position in society without spending more than his income; debts accumulate; he mortgages his estate, and insures his life for the security of the mortgagee. Of course he cannot afford to lay out anything on improvements; on the contrary, though perhaps naturally kind-hearted and just, his necessities force him to resort to every means of increasing his *present* rental. He looks for the utmost amount; he lets to the highest bidder, without regard to character or means of payment. If his tenants are without leases, he raises their rents. If leases fall in, he cannot afford to give the preference to the last occupier. Perhaps, with all his exertions, he is unable

to pay the interest, or put off his creditors. Proceedings are commenced against him, and the estate passes, during his life-time, under the care of the worst possible landlord, a receiver under the Court of Chancery." — Pp. 6-9.

We may add, that we trust that in his proposed remedial measures, Lord John Russell will not drive the parties into the Court of Chancery, but will avail himself of the more summary, simple, and economical machinery of commissioners. In its present state, to talk to a landowner of the Court of Chancery as connected with relief would be considered a very unseasonable joke.

NOTE AS TO THE INNS OF COURT.

THE cause of Legal Education is proceeding very satisfactorily. In Michaelmas Term, Mr. George Long commenced his Lectures on Jurisprudence and the Civil Law. He delivered two Introductory Lectures, in the Hall of the Middle Temple, which were attended most numerous and respectably, and the result has been, that a class has been formed of about 120 persons, of whom we are assured, about 80 regularly attend. This is an excellent commencement. Gray's Inn has been the next Inn to take its place as assisting Legal Education. At a Pension, held on the 24th day of November, the Masters of the Bench, having resolved to establish "a Lectureship of Real Property and Conveyancing, Devises, and Bequests," and having ordered that the sum of 300*l.* per annum, for three years, be paid by the Society by way of endowment to the Lecturer; invited gentlemen, desirous of the office, to send in testimonials of their competency and fitness, on or before the last day of Hilary Term, 1847. The Benchers also expressed their wish, that the Students should be invited to join in the discussion of some appointed subjects—subject to proper regulation—and that further opportunities should be afforded to Students of stating, and of obtaining from the Lecturer, the solution of difficulties, and by examinations in the subjects of previous lectures and discussions. Here we have the revival of the ancient mootings and readings clearly pointed at, which were once so useful: and we entirely and cordially approve, both of the suggestions to the Lecturer and the manner in which they are made. At Lincoln's Inn and the Inner Temple, proceedings have also taken place. To the first the Equity Lectureship has been assigned; to the latter the Lectureship on Common Law. The Inner Temple has in this Term announced this to the Legal Community in the usual way. Lincoln's Inn has not as yet made any formal announcement,

and possibly before it does there may be a General Meeting of all the Inns of Court, and we trust, that the result will be, that uniform regulations, as to admission, call to the bar, and attendance on lectures, will be established. Although a compulsory examination is not, at any rate, in the first instance, expedient, yet we have always been of opinion, that a compulsory attendance on lectures is necessary for the success of the plan.

We are glad to find that this subject is as interesting on the other side of the channel as on this. Mr. Joy's letters¹ are agreeably written, and are interesting, as containing extracts from the evidence taken before Mr. Wyse's committee, which, we are sorry to say, has not yet been printed. It is exceedingly inconvenient thus to defer the publication, not only of the report, but also of the evidence, which would have been of great use to the benchers in completing their plan of education. As it is, we hope we shall soon have the whole subject before us, when we shall be glad again to refer to Mr. Joy's letters.

While on the subject of the Inns of Court, we may mention that judgment has been given in the case of Mr. Hayward, which has been repeatedly brought before our readers. After an argument², which lasted for several evenings at Serjeant's Inn, conducted for Mr. Hayward, first by Sir Thomas Wilde and Mr. Merivale, and afterwards by Mr. Serjeant Talfourd and Mr. Merivale; and for the Inner Temple, first by Sir Charles Wetherell, and then by Sir Frederick Thesiger, the undersigned judges gave the following opinion:

On the Petition of A. Hayward, Esq., Q. C.

“The Judges who heard this petition argued, in the exercise of their general visitatorial power, think it right to

¹ Letters on the present State of legal Education in England and Ireland, addressed to George Alexander Hamilton, Esq., M.P. By Henry Holmes Joy, Esq., Barrister-at-Law. 1847.

² Short-hand writers having been employed, we trust that a full report of this case may be given to the public. We understand that the argument embraced the entire history of the profession from its earliest stage.

declare their unanimous opinion, that the Benchers of the Inner Temple have the right to determine,—first, whether they will add to their number by any new election; and secondly, which of the Members of the Bar belonging to their Society they will elect to call to the Bench.

“The Judges, therefore, are all of opinion that the petitioner had no inchoate right to be called to the Bench; but they all think that the mode of election, by which a single black ball may exclude, is unreasonable; and they strongly recommend the Benchers of the Inner Temple in future to conduct their elections to the Bench on some more satisfactory principle.

(Signed)

DENMAN.

F. POLLOCK.

J. PARKE.

E. H. ALDERSON.

J. PATTESON.

T. COLTMAN.

R. M. ROLFE.

W. WIGHTMAN.

C. CRESSWELL.

W. ERLE.

T. J. PLATT.”

This judgment has already led to the abrogation of the rule which has appeared so objectionable,—the exclusion by one black ball, of a person proposed for election to the Bench of the Inner Temple. It has been determined that henceforth a majority of the Benchers must vote for the candidate. But the mode of voting by ballot has not been altered, and it is understood that *four black balls* will exclude. This case decides a point as to which we found it necessary to insert an argument (but as to which we think there could be no real doubt), that the Judges have jurisdiction over and are the proper Visitors of the Inns of Court.

PROCEEDINGS OF THE SOCIETY

FOR

PROMOTING THE AMENDMENT OF THE LAW.

[Continued from 4 *Law Review*, p. 458.]

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

GENERAL MEETING, July 29. 1846.—**WILLIAM EWART, Esq., M.P.,**
in the Chair.

THE Minutes of the last Meeting. (the 15th instant,) were read and confirmed. The following Members were ballotted for and elected: Arthur Kett Barclay, Esq., W. G. Prescott, Esq., Banker, and Joseph Travers, Esq.

A Communication from Mr. Garrard, Solicitor, as to the state of the Court of Chancery, was read.

Adjourned, till Wednesday, the 12th of August, at half-past four precisely.

GENERAL MEETING, August 12. 1846.—**THE RIGHT HON. LORD BROUGHAM** in the Chair.

The Minutes of the last Meeting (the 29th of July last) were read and confirmed. The following Members were ballotted for and elected: Viscount Ebrington, M.P., Montague Gore, Esq., M.P., William Hull Terrell, Esq., Barrister, Thomas Neufville Grosse, Esq., Solicitor, James Reddie, Esq., Advocate, and George Gisborne Babington, Esq., Surgeon.

Adjourned till Wednesday, the 4th day of November, at eight o'clock in the evening precisely.

Notices for Wednesday, the 4th of November.

1. The first Report of the Committee appointed to consider the best means of extending the range of the Society's operations will be presented.

2. The Report of the Committee on the Law of Real Property on the following reference will be further considered : "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced."

3. A communication as to a summary mode of proceeding in Equity in some parts of the West Indies, will be read.

GENERAL MEETING, Nov. 4. 1846.—The RIGHT HON. STEPHEN LUSHINGTON in the Chair.

The Minutes of the last Meeting (the 12th of August last) were read and confirmed. The following Members were ballotted for and elected : the Earl Fitzhardinge, Edwin Chadwick, Esq., Barrister, Henry Lund, Esq., Barrister, and F. Dumergue, Esq., Barrister.

The First Report of the Committee appointed "To consider the best means of extending the range of the Society's operations," was presented and agreed to.

The Report of the Committee on the Law of Property on the following reference was presented : "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced." It was agreed that the Report should be printed, and further considered at the next meeting.

Notices for Wednesday, the 2d of December.

1. The Report of the Committee on the Law of Property as to Insurance of Titles will be further considered.

2. A communication as to a summary mode of proceeding in Equity in some parts of the West Indies, will be read.

GENERAL MEETING, Dec. 2. 1846.—The RIGHT HON. LORD BROUGHAM in the Chair.

The minutes of the last Meeting (the 4th of November last) were read and confirmed. The following Members were ballotted

for and elected : Matthew Talbot Baines, Esq., Q. C., Rupert Kettle, Esq., Barrister, David Power, Esq., Barrister, Archibald John Stephens, Esq., Barrister, and James Adam Gordon, Esq.

The following reference was made to the Committee on the Law of Property : "To consider the propriety of making a General Map of the lands of England and Wales, for the purposes of Registration and Conveyance, and otherwise, and to ascertain what steps have been taken, and what materials are forthcoming for making such a Map."

A Report on Captain Maconochie's plan for Secondary Punishments having been presented by the Committee on Criminal Law and received, and several Papers on the Reformation of Juvenile Offenders having been brought under the notice of the Society, it was resolved, "That a Special General Meeting be held on Wednesday the 16th instant, to take the subject of these communications into consideration, with a view to ascertain the principle on which secondary punishments should be awarded."

The Report of the Committee on the Law of Property on the following reference, "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced," was ordered to be received.

Adjourned till Wednesday, the 16th instant, at Eight o'clock in the evening precisely.

Notice for Wednesday, the 16th inst.

To take the subject of the communications as to Secondary Punishments and Juvenile Offenders into consideration.

GENERAL MEETING, Dec. 16. 1846.—Mr. COMMISSIONER
FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 2d instant) were read and confirmed. The subject of the communications as to Secondary Punishments and Juvenile Offenders was considered, and it was agreed that the following reference should be made to the Committee on Criminal Law :—"To report on the various plans which have been tried or proposed for the improvement of the treatment of Criminals, and young persons likely to become Criminals, and further to report on the principles on which punishments ought to be awarded and conducted."

The following reference was made to the Committee on Colonial

and Navigation Laws :—“ To consider the Law and Practice as to Colonial Judgeships with respect to their removal.”

Adjourned till Wednesday, the 6th of January, 1847, at Eight o'clock in the evening precisely.

Notices for Wednesday, the 6th of January.

1. A communication as to the Law and Practice of registering deeds and instruments in the United States of America will be read.

2. A Report from the Committee on Criminal Law as to Secondary Punishments and Juvenile Offenders will be presented

GENERAL MEETING, Jan. 16. 1847. — The RIGHT HON. LORD BROUGHAM in the Chair.

The Minutes of the last Meeting (the 16th of Dec. last) were read and confirmed. The following Members were ballotted for and elected: the Earl of Wilton, A. E. Cockburn, Esq., Q. C., Alexander Pulling, Esq., Barrister, Peter Cator, Esq., Barrister, Edward Lawrence, Esq., Solicitor, Alexander Colvin, Esq., and F. N. Walsh, Esq.

A communication as to the Law and Practice of registering deeds and instruments in the United States of America was read.

The presentation of a Report from the Committee on Criminal Law on the following reference was postponed till the next Meeting: — “ On the various plans which have been tried or proposed for the improvement of the treatment of Criminals, and young persons likely to become Criminals, and further to report on the principles on which punishments ought to be awarded and conducted.”

Notices for Wednesday, the 3rd of February.

1. A Report from the Committee on Criminal Law as to Secondary Punishments of Juvenile Offenders will be presented.

2. A Report from the Committee on Equity on the following reference will be presented :—“ To consider whether any and what improvement can be made in the present mode of proceeding in the Masters' Offices.”

3. A Report from the Committee on the Law of Property on the following reference will be presented :—“ To consider the propriety of making a General Map of the lands of England and Wales, for the purposes of Registration and Conveyance, and otherwise, and to ascertain what steps have been taken, and what materials are forthcoming for making such a Map.”

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST NOVEMBER, 1846.¹

POINTS IN COMMON LAW, p. 435.

POINTS IN EQUITY, p. 446.

POINTS IN THE LAW OF DEBTOR AND CREDITOR, p. 461.

POINTS IN THE LAW OF PROPERTY, p. 466.

COURTS.	REPORTERS.
Lord Chancellor - - -	1 Cooper. Part 1.
	1 Phill. Part 4.
L. C. of Ireland - - -	2 Jones and Latouche. Part 1.
Rolls Court - - -	8 Beavan. Parts 1, 2.
V. C. of England - - -	14 Sim. Parts 1, 2.
V. C. Knight Bruce - - -	2 Coll. Parts 2, 3.
V. C. Wigram - - -	5 Hare. Part 1.
Queen's Bench - - -	6 Q. B. Rep. Parts 3, 4.
Common Pleas - - -	2 C. B. Rep. Part 2.
	7 Mann and Gr. Part 4.
Exchequer - - -	14 Mees. and W. Part 4.
	15 Mees. and W. Part 1.
Practice Cases - - -	3 Dowl. and Lowndes. Parts 3, 4.
Court of Bankruptcy - - -	1 De Gez. Part 1.

I. POINTS IN COMMON LAW.

1. Railway Company—Refusal—Mandamus. 2. Railway Shares—Joint Stock Companies Registration Act. 3. Trover—Conversion. 4. Seduction—Pleading—Right of Action. 5, 6, 7. Arbitration—Reconsideration of Award—Alteration of Award—Pleading. 8, 9. Contract—Construction. 10. Bond

¹ Some of the following cases were reported before last November, and were in type for our last number; but, from press of other matter, they could not be then inserted. — Ed.

—Stamp. 11. Information—Commission to examine Witnesses abroad. 12. Usury—Loans on real Security. 13. Provisional Committee—Joint Action—Release by Two of the Plaintiffs. 14. Exemption from Arrest—Dramatic literary Property—Penalties.

1. REGINA v. NORWICH AND BRANDON RAILWAY COMPANY.
3 Dowl. & Lowndes, 385.

Railway Company—Refusal—Mandamus.

PRIVATE acts of parliament for the construction of canals, railways, and other like undertakings, were regarded by Lord Eldon in the light of *contracts* made by the legislature on behalf of every person interested in any thing to be done under them; and his Lordship declared, that unless that principle were applied in construing statutes of that description, they would become instruments of greater oppression than any thing in the whole system of administration under our constitution.¹ By an analogy, therefore, to the equitable doctrine of the specific performance of contracts, courts of law have, on several occasions, issued a mandamus to railway companies, commanding them to execute their works in a manner conformable to their respective acts of incorporation. Where a departure from these acts occurs, a court of equity on the one hand has jurisdiction to restrain the irregularity by an injunction, while, on the other hand, a court of law has jurisdiction by a mandamus to compel the execution of the undertaking in the appointed manner. An instance of the exercise of the latter power occurs in the present case. The Norwich and Brandon Railway Company were required by their act of parliament², on making a bridge for the purposes of their railway over the river Yare, at Lakenham, to construct such bridge “so as to leave the same width of water-way under the same as at present exists, at the point where the said river will be crossed, and so that there shall be at all times a clear height of five feet above the ordinary level, or usual water-mark of the said river under such bridge for the passage.” And in case the bridge should not be properly built, “according to the true intent and meaning of the act,” after notice in writing given to the company by the owner or occupier of the lands, the justices of the peace were authorised to grant an order; enabling such owner or occupier to make the same, and the reasonable expenses thereof were to be defrayed by the said company. The company proceeded to construct a bridge of less height, and

¹ Blakemore v. Glamorganshire Canal Navigation, 1 Myl. and Keen, 154.

² 7 Vict. c. 15. (local, personal, and public).

leaving less width of water-way than the act directed, and thereby impeded the passage of water to a mill situated on the river Yare, and belonging to the Norwich Insurance Company. The proprietors of the mill served a notice upon the Railway Company, calling upon them to construct the bridge so as to leave the same width of water-way, and the same height as existed at the time of the passing of the act. The solicitors to the company replied, that the company intended to make the bridge of the required height; but that as to the other matters referred to in the notice, they were instructed to receive any process which the proprietors might think proper to institute in respect thereof. Two other letters on the subject, sent to the company subsequently by the proprietors, not having been answered, an application was made to the Court of Queen's Bench for a mandamus, commanding the company to construct the bridge in the manner directed by the act. It was stated on behalf of the company, that the necessary alterations had been commenced, but that the works had been stopped by floods. It was contended, that there had been no direct refusal on the part of the company, and that, therefore, there was no ground for issuing a mandamus; and also, that the act having pointed out a specific legal remedy, namely, by application to the justices of the peace, the party was bound to pursue it, and could not go to the court for a mandamus.

Patteson, J. "The statute does not say that the justices shall have power to order the company to build the bridge. It would be very hard if a party were confined to the remedy of pulling down the bridge and building up a new one. I am of opinion that this rule must be made absolute; and for this reason. Here is a letter written by the solicitors of the Railway Company in answer to a letter from the Insurance Society, which makes two complaints; with the first of which they say the Railway Company will comply; but as to the other complaint, they say they are instructed to accept service of any process which the Insurance Company may think proper to bring against them. If the latter part of that letter is not a refusal by the company, I am at a loss to know what is to be considered a refusal. . . . Then two other letters were sent to them by the Insurance Society, to which they make no reply. If these companies will take upon themselves to treat parties with so little respect, they must take the consequences upon themselves, and I cannot assist them." Rule absolute for a mandamus.

2. **YOUNG v. SMITH.** 15 Mees. & W. 121.*Railway Companies — Joint Stock Companies — Registration Act.*

The point decided in this case was a subject of much interest at the time, as the judgment of the Court materially affected the prospects of the suitors in a large class of cases relating to the previous extensive transactions in railway scrip. The Court unanimously ruled that the 26th section of the Act 7 & 8 Vict. c. 110., for the Registration of Joint Stock Companies, whereby the sale of shares in a Company was prohibited until after *complete* registration, does not apply to Railway Companies. The effect of the decision, therefore, was to leave dealings in railway scrip to the ordinary operation of the common law.

3. **THOROGOOD v. ROBINSON.** 6 Q.B. 769.*Trover — Conversion.*

The plaintiff in this case (a lime-burner) was in possession of certain land and the lime, &c., lying upon the land. Defendant having recovered judgment in ejectment for the land, entered under the writ of possession, and turned off plaintiff's servants, who were loading a barge with part of the lime, and refused to allow them to put any more on the barge. The plaintiff having brought trover for the lime, it appeared in evidence that defendant was entitled to the land as landlord of a person in whose absence plaintiff had entered without title, and the jury, under the direction of Lord Denman, C.J., gave a verdict for defendant. On a motion for a new trial, it was contended that the Court ought to have told the jury that the facts amounted to a conversion. Lord Denman, C. J. "The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods, but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them, or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion." Coleridge J. "Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's

goods; what he was bound to do was, on demand, to let the plaintiff remove the goods, or to remove them himself to some convenient place for the plaintiff." Rule refused.

4. GRINNELL v. WELLS. 7 Mann. & Gr. 1038.

Seduction — Pleading — Right of Action.

In this case the plaintiff's daughter had been seduced by the defendant. She was not resident with her father, and the declaration, therefore, omitted the usual clause *per quod servitium amisit*. There was an allegation, however, that the daughter being delivered of a child, and thereby becoming unable to work, or to maintain herself, the plaintiff her father, being of sufficient ability to maintain her, was by means of the premises forced and obliged to, and necessarily did, maintain his said daughter at his own charges during the time she was unable to maintain herself. In argument upon the sufficiency of this allegation to sustain the action, the plaintiff relied upon the statute 43 of Elizabeth, cap. 2, s. 7. to maintain his daughter created a sufficient ground of action. Tindal C. J. "Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies. In the first place, if the liability to support the daughter under the statute of Eliz. would form a ground of action *per se*, independently of any service, it would seem scarcely credible that the difficulty of the proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration, like the present, upon the legal liability of the father to maintain his daughter under the statute.

"In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not; and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon, under the statute, to maintain his son.

"And, still further, this anomaly would follow, that, as the father is only liable, under the statute, to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father, when he brings the action, are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particu-

lar case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community — a result that would be most unreasonable.

“We, therefore, think for the reasons above given, the cause of action as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.”

5. HOWETT V. CLEMENTS. CLEMENTS V. HOWETT.
7 M. & G. 1044.

Arbitration — Alteration of Award — Practice.

In the first of the above-mentioned causes, a verdict was ordered to be entered for the plaintiff Howett with damages, subject to the award of an arbitrator, to whom both causes and all matters in difference between the parties were referred. The arbitrator made his award in both causes in favour of Howett, but a mistake arose in copying the award, the name of Howett being therein written *James* Charles Howett, instead of *Joseph* Charles Howett. The order contained a clause empowering the Court to refer back the award to the arbitrator for amendment, and a rule was obtained, calling upon Clements to show cause why the *postea* in the first-mentioned cause should not be delivered to the plaintiff, and why judgment should not be entered in both causes pursuant to the award, or why the matter should not be referred back to the arbitrator to amend his award by correcting the error made in the Christian name of Howett. Tindal, C. J. “The clause empowering the Court to refer back the award to the arbitrator for amendment, must be construed with some degree of liberality. The affidavit shows that the award was intended as an award made in the causes referred under the order of *nisi prius*. Let it go back to the arbitrator to be amended.”

6. NICKALLS V. WARREN. 6 Q. B. 615.

Arbitrator — Reconsideration of Award.

This cause (which was between two mill-owners, concerning the manner in which they should make use of a certain stream of water) was referred to arbitration; and the order of reference provided that if the validity of the award should be disputed, or a motion made to set the same or any part thereof aside, the Court of Queen's Bench should have power to remit the matters thereby

referred to the reconsideration and determination of the arbitrator. The arbitrator made his award, but the plaintiff being dissatisfied therewith, the Court ordered that the matters referred by the order of *nisi prius* should "be remitted back to the reconsideration and determination of the arbitrator." Under this order the arbitrator proceeded on the reference, and the defendant's counsel tendered several witnesses whose evidence was not known to the plaintiff or his attorney before the making of the award, but would, as counsel stated on the reference, have been of the highest importance with respect to the main point in dispute. The arbitrator, however, refused to hear such witnesses, or to receive any further evidence on the matters in difference, and he afterwards made his further award written at the foot of the original one. It was held by the Court of Queen's Bench, that as the order stood all the matters were referred back; that the arbitrator was in a position which required him to hear the whole cause again, and that he ought to have heard the further evidence which had been tendered.

7. SUTCLIFFE V. BROOKE. 14 Mees. & W. 855.

Pleading — Award.

This was an action of debt on an award. The declaration alleged that in consideration of the *plaintiff agreeing* at the defendant's request to abide by and perform the award, the *defendant agreed* with the plaintiff to perform the award on his behalf, and there was an averment that the defendant had not paid the sum awarded. Pollock, C.B. "I think this is a vicious declaration. The introduction of the averment of mutual promise makes it an action of debt to perform an award when made, and not an action of debt on the award itself. The plaintiff had better amend."

8. WIMSHURST V. DEELEY. 2 C. B. Rep. 253.

Contract — Construction.

The defendants proposed by letter to supply to the plaintiff, into the East India Docks, an engine, boiler, &c., for a certain vessel, "in conformity to the *drawings and specifications* furnished by B.;" and the plaintiff by letter accepted the offer. The defendant's letter contained other particulars on the subject of the

contract, but did not, in specific terms, state at what time the engine, &c., were to be supplied. The specification, however, contained a condition that they should be completed and delivered *within two months*. The engine, &c., were not delivered for six months, and the plaintiff brought an action of assumpsit to recover damages for the loss of the use of the vessel in consequence of the delay. It was contended on behalf of the defendants, that their letter excluded that part of the specification which related to the time of performance of the contract, if not expressly, at least by implication; and that the contract was, according to its legal effect, a contract to furnish the engine, &c., within a *reasonable time*. Tindal, C. J. "The fair interpretation of the contracts—the offer on the one side, and the acceptance on the other—appears to me to be, that the engine and boilers should be completed and delivered within two months. This might be a most important consideration on the plaintiff's part. Without the machinery the vessel would be useless; and the plaintiff may have entered into engagements from which he could not recede. The specifications containing a stipulation that the engine, &c., should be completed and delivered within two months, when the defendants, in their letter of the 15th of July, say, 'We shall be willing to supply an engine and boilers, including friction-couplings, in conformity to the drawings and *specifications*.' I think they adopt the whole of the specification to which they do not specifically except. I, therefore, think there is no ground for the present motion."

9. PONTIFEX V. WILKINSON. 2 C. B. Rep. 349.

Contract—Construction.

The plaintiffs in this case agreed with defendant, by letter, to prepare certain machinery, and fix the same in a brewery; but no allusion was made to the time for payment until after the work was in progress, when the plaintiffs required the defendant to give security for payment on the completion of the work. The defendant refused to give security, but gave two references as to his responsibility, both of which the plaintiffs declared to be unsatisfactory; and, in a letter to defendant's attorney, they renewed their application for security. The defendant persisted in refusing to give security; and his attorney wrote to plaintiffs in the following terms:—"We have considered it more desirable to dispense with your assistance in the matter." The plaintiffs then brought

an action of assumpsit to recover the amount mentioned in the contract, and obtained a verdict. On a new trial, the Court left it to the jury to say, what was the real contract between the parties, to be collected from the correspondence, and a verdict was then given for the defendant. The plaintiffs then moved for a new trial. Tindal, C. J. "The question substantially raised at the trial was, whether the non-performance by the defendant of a contract by which the plaintiffs had agreed to supply and fix for the defendant certain brewing apparatus, which the defendant had to get supplied and fixed at a brewhouse belonging to H., and by which contract the defendant had agreed to accept and pay for the same on the delivery and fixing thereof, was occasioned by the fault of the plaintiffs or of the defendant. The defendant, at the trial, insisted that it was by the default of the plaintiffs that the contract was unperformed; inasmuch as they, the plaintiffs, had refused to proceed with the order unless security were given for the payment; a condition which they had no right to impose, as the contract was altogether silent upon the subject. The jury were of this opinion, and we think they were right." Judgment for the defendant.

10. FRITH v. ROTHERAM. 15 Mees & W. 39.

Bond — Stamp.

A bond having been given to bankers to secure all monies not exceeding 1000*l.* due from the defendant on the balance of his account current, *together with such interest and commission* as should be due to the bankers, and all customary charges for stamps, &c., it was objected, at the trial of an action on the bond, that the stamp of 6*l.*, which it bore as the *ad valorem* duty on 1000*l.*, was not sufficient. The Court decided that the stamp was right; that, as a clear principle, the subject could not be charged with duties unless imposed by express words; that the act extended only to monies secured to be *repaid*; and that the word *repayment* could never apply to commission or interest. The Lord Chief Baron also thought it probable that the bond meant nothing more than that, on making up the account current, interest and commission were to be included in the account.

11. ATTORNEY-GENERAL v. BOVET. 15 Mees & W. 60.

Information — Commission to examine Witnesses abroad.

This was an information, filed on the common-law side of the Exchequer, to recover penalties for a breach of the revenue laws. The defendant applied to the Court for a commission to examine witnesses abroad, and for an order to stay trial till the return of the commission. It was argued, from the admitted jurisdiction of the Court on the equity side to issue such a commission, that a similar jurisdiction existed on the common-law side. But all the Barons held the contrary, and refused the motion.

12. BELL v. COLEMAN. 2 C. B. Rep. 268.

Usury — Loans on Real Security.

By stat. 3 & 4 W. 4. c. 98. s. 7., bills of exchange and promissory notes, not having more than three months to run, were exempted from the usury laws; by 7 W. 4. and 1 Vict. c. 80. the exemption was extended to bills, &c., not having more than twelve months to run; and by 2 & 3 Vict. c. 37., which continued the 7 W. 4. and 1 Vict. c. 80., it was provided (s. 1.) "that nothing herein contained shall extend to the loan or forbearance of any money upon security of *lands, tenements, or hereditaments, or any estate or interest therein.*" Subsequently to the 3 & 4 W. 4. c. 98., A., the defendant in this action, discounted bills for B. to the amount of 1000*l.*, taking more than 5 per cent. discount. When the bills became due, which was prior to the passing of the 2 & 3 Vict. c. 37., B. being unable to pay then, and being pressed for payment, deposited with A., as a collateral security for the 1000*l.*, a deed securing an annuity upon *real estate*, but without saying anything about the rate of interest. The Bills were several times afterwards renewed at a higher rate of interest than 5 per cent.; but this was done without reference to the deed which had already been deposited: and all the subsequent dealings with the bills took place before the passing of the 2 & 3 Vict. c. 37. An action of trover was brought to recover possession of the annuity deed, on the ground of usury, the annuity secured by the deed being charged upon *real estate*. The Court, however, was of opinion that the deposit of the deed was originally a valid and subsisting security for the 1000*l.*; and that nothing had taken place since

to invalidate it. And it was also held, that the proviso of the 2 & 3 Vict. c. 37. s. 1., "that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein," does not, by any retrospective force, operate on by-gone transactions.

13. RAWSTONE V. GUNDELL, 3 Dowl. & Lowndes, 682.

Provisional Committee — Joint Action — Release by Two of the Plaintiffs.

This was an action brought by the Provisional Committee of a Railway Company against their engineers, for a breach of contract in not completing their works in time to make the proper deposit of the plans at the board of trade. After issue joined, two of the plaintiffs released the defendants; and the cause being entered for trial at Liverpool on the 21st March, the attorney for the defendants on the evening of the 20th delivered a plea puis darrein continuance of the release. This stopped the action. It was thereupon argued that the plea was in itself fraudulent and void. Pollock, C. B. "You must not confound fraud with impropriety of conduct. It may be a very wrong thing to execute a release under circumstances like the present; it may be an act which an honest man would not do, and one for which he may be responsible to another tribunal: but if there be the smallest scintilla of right or real interest upon which the release may operate in law, we cannot interfere." Parke, B. "You are bound to show that the release was a fraud on the other plaintiffs; that has not been done, and your remedy is by bill in Equity."

14. FITZBALL V. BROOKE. 6 Q. B. 873.

Exemption from Arrest — Dramatic literary Property — Penalties.

Judgment had been recovered against the defendant for 12*l.*, in an action of debt for six performances of a play, without the author's consent; the damages being laid at 40*s.* for each performance. The defendant was taken on a *ca. sa.*, but was discharged by the Court of Queen's Bench on the ground that this was a "debt recovered," within the meaning of the stat. 7 & 8 Vict. c. 96., which exempts defendants from being taken or charged in execution in any action for the recovery of a debt, wherein the sum recovered shall not exceed 20*l.* The question, it was contended, that the six sums recovered and making up 12*l.* were penal-

ties, and, therefore, not within the act. The Court was, however, of opinion that under the stat. 3 & 4 W. 4. c. 15., for amending the laws relating to dramatic literary property, the sums recovered were damages, and not penalties.

II. POINTS IN EQUITY.

1. Injunction — Doubtful Equity. 2. Lease — Right of Renewal. 3, 4, 5. Vendor and Purchaser — Application of Purchase Money — Subcontract — Conditions of Sale — Practice. 6. Unclaimed Dividends — Fraud. 7. Probate Duty — Conversion. 8. Trust Estate — Prerogative — Bona Vacantia. 9. Partnership — Insanity — Dissolution. 10. Trustee Act — Practice. 11. Breach of Trust — Banker's Accounts. 12. Legacy — Forfeiture — Restraint on Alienation. 13. Pleadings — Statute of Limitations. 14. Baron and Feme — Provision for Separation — Public Policy. 15. Power of Appointment — Fraudulent Execution. 16. Mortgagee — Power of Sale — Oppressive Conduct. 17. Trustees — Imperative Trust — Leaseholds.

1. RIGBY V. GREAT WESTERN RAILWAY COMPANY. 1 Coop. 2.

Injunction — Doubtful Equity.

On the very first day of his resuming the judicial chair, Lord Cottenham had occasion to enforce a principle which he had often previously enunciated; that, where an equity is dependent on a legal right, and where the question is, whether there ought to be an injunction, the Court, looking at both sides to see in which way the least possible loss would fall upon either party, would put the case in train to have the legal right speedily ascertained, and give protection in the meantime to the rights of both parties. His Lordship took this course in the case before us, by varying an order of Vice-Chancellor Wigram, who had granted an injunction positively restraining the exercise of the legal right.

2. CLAYTON V. THE ATTORNEY-GENERAL. 1 Coop. 44.

Lease — Renewal.

The most remarkable judgment in Mr. Cooper's new Reports is one by Lord Chancellor Brougham, in June, 1834, now published for the first time, "as affording" (Mr. Cooper tells us) "a peculiar

specimen of his lordship's juridical style." In this case the plaintiff claimed absolutely from the crown, and independently of any special covenant for that purpose, a renewal of a lease for lives of certain premises parcel of the Duchy of Cornwall. The passage in question is as follows: "It is said that this is not merely the case of the Clayton family, but of many other mesne lessees, and that the decision of it will affect not only the leases of the tenants paravail on that estate, but hundreds of others; in a word, that it is the case of all the tenants mesne or paravail of all the Duchy of Cornwall. I fully accede to this proposition; only I carry it further. For it is not merely the case of this duchy, but of many others;—the Duchies of Portland and Bedford, and Cleveland, and Sutherland, and Rutland; and it is not only the case of those ample domains, but of all other proprietors, great and small, and their tenants. It is the case of every one estate in the towns and in the countries where the land has been leased for a length of time, and the terms have not been suffered to expire. There is nothing to distinguish the case of the King or his eldest son the Prince¹, and their tenants, from that of all other landlords and all other tenants throughout the realm. Were I to give judgment now against the crown, I should make every title throughout the kingdom shake, and conjure up a fearful group—a host of dark and fantastic suitors—to blacken this hall, and fill its air with novel and discordant sounds, uncouth to all learned ears, unintelligible to all learned minds; and I should involve the community and its real property in a maze of groundless, endless, pitiless litigation." Judgment was, therefore, of course for the crown.

3. *FORBES v. PEACOCK.* 1 Phill. 717.

Vendor and Purchaser—Application of Purchase Money.

In a former number (Vol. I. p. 491.) attention was called to a very important conflict of judicial opinion in the cases of *Page v. Adam* (4 Beav. 269.) and *Forbes v. Peacock* (12 Sim. 528.). In *Page v. Adam*, Lord Langdale, M. R., had held, that where a man by deed or will charges his estates with payment of his debts generally, or orders his estate to be sold for that purpose, the purchaser is not liable to see to the application of his purchase money, or to inquire into the state of the trustees' accounts, notwithstanding notice of the payment of the debts. But in *Forbes v. Peacock*, where the estate was liable to a primary general

¹ The Crown was sued as in right of the then non-existent Prince of Wales, who, when existing, is Duke of Cornwall.

charge of debts, and the sale took place twenty-five years after the testator's death, and the vendors refused to state whether or not the debts had been paid, the Vice-Chancellor of England held that the purchaser was not exonerated, and had a right to require that the *cestuis que trust* should be parties to the conveyance. An appeal from this decision having taken place, the judgment of the Vice-Chancellor was reversed by Lord Chancellor Lyndhurst with his Honour's concurrence, and in accordance with Lord Lyndhurst's opinion, as expressed in *Johnson v. Kennett* (3 Myl. & K. 631.), that in such cases the rule of exoneration in favour of purchasers is a positive rule of construction applicable to the state of things at the death of the testator; and that if the debts are afterwards paid, and legacies alone are left as a charge, that circumstance does not vary the general rule.

4. HOLROYD v. WYATT. 2 Coll. 327.

Vendor and Purchaser — Sub-contract — Practice.

The common rule in Chancery respecting sales under a decree is, that if a purchaser makes a sub-contract of sale before he has had his own purchase confirmed by the Court, the sub-purchaser becomes a purchaser under the Court, and is responsible to the Court for the purchase-money. In the present case, one Ross was the highest bidder for a lot, which was knocked down to him at 4160*l.*; and he signed an agreement for the purchase at that price. Soon afterwards one Haines told the auctioneer that, although Ross was the apparent bidder, he, Haines, was the real purchaser, on behalf of one Farrance. The auctioneer then, by consent of Ross, cancelled his signature to the contract, and allowed Haines to sign it on behalf of Farrance as the purchaser for 4160*l.* Haines at the same time paid a deposit on the purchase-money. Ross received the 340*l.* from Farrance, and then went out of the jurisdiction of the Court. It turned out that Ross had been a real purchaser, and that after the lot was knocked down to him, Haines, on behalf of Farrance, had offered to purchase the lot from Ross on payment to him of 340*l.* beyond the 4160*l.*, and that a sub-contract had been effected upon these terms. Under these circumstances a petition was presented, praying that Farrance might be deemed the purchaser at 4500*l.*, and be ordered to pay that sum into Court, or that Farrance might pay 4160*l.* and Ross 340*l.* into Court, or that the contract might be declared void, and a re-sale directed. Vice-Chancellor Knight Bruce: "I am not by any means sure that, in

strictness, the Court might not have treated Farrance as a purchaser direct from the Court at the larger sum, and have disregarded the payment to Ross; but I know no case that has gone that length. I am not prepared to say that there is any moral fraud in this case — anything dishonest, however inaccurate the proceeding may have been. Upon the whole, I think that the ends of justice will be satisfied by directing this property to be re-sold; reserving the question whether, if the property shall not produce 4500*l.*, Farrance shall be answerable to the Court, and reserving all question of liability in Ross."

5. DUKE V. BARNETT. 2 Coll. 337.

Vendor and Purchaser — Conditions of Sale.

In this case the purchaser had agreed to accept the vendor's title "without dispute;" and a conveyance having been accordingly prepared, the purchaser's solicitor requested to see an abstract of the title. This having been furnished, the solicitor objected that the property in question having formerly been mortgaged with other property, had not been included in a release or reconveyance of the mortgaged premises; and he accordingly required a fresh release. The vendor, however, refused to procure the release, and filed his bill for specific performance of the agreement. Vice-Chancellor Knight Bruce: "There was a flaw in the vendor's title, and it consisted in this: that some incumbrancer had executed a release or reconveyance defective in point of parcels, which left an outstanding legal estate in the property, or a portion of the property. This, though matter of conveyance, affected Edwards's (the vendor's) title: it was a defect, subject to which Edwards held the property. Assuming the defect to exist, as the lessee was under the obligation, if he exercised the option of buying, to accept the title without dispute, I am of opinion, that he is precluded in this court, and at law, from taking an objection upon a defect in that release or reconveyance, if defect there was."

6. Ex parte JOLLIFFE. 8 Beavan, 168.

Unclaimed Dividends — Fraud.

About forty years ago Mary Hunt of Bristol died possessed of 1210*l.* 3 per cent. consols, which was overlooked by her executors, and was after the proper lapse of time transferred by the Bank of England to the commissioners for the reduction of the national

debt. In May, 1842, the Bank retransferred the stock to one Sanders, who, in the assumed name of Thomas Hunt, had obtained probate of a forged will of Mary Hunt, and claimed the re-transfer as her executor. Afterwards, in 1844, the two surviving genuine executors of Mary Hunt became aware of her title to the stock in question, and presented a petition to the Court of Chancery, alleging the Bank's refusal to transfer the fund to them, in consequence of the previous transfer with Sanders, and praying that the commissioners for the reduction of the national debt might be ordered to transfer the amount to the petitioners with a large arrear of dividends. Lord Langdale, M. R. "Whatever authority there might have been to transfer to Thomas Hunt, if a real person named in a pretended 'will, of which probate had been granted to him, there was no authority to consider William Sanders, pretending to be Thomas Hunt, as the person to whom the probate was granted. The fraud and deception practised on the Court of Probate could not give to William Sanders the right to be treated as Thomas Hunt any where else, and could not entitle any third party to deal with him as if he were Thomas Hunt to whom the probate was granted Whatever may be the inconvenience, and it is alleged that eventually some inconvenience may arise, from ordering the commissioners to make a transfer and payment from other stock and dividends in their hands, under the act 56 Geo. 2. c. 60., it is clearly directed that such transfer and payment may be ordered to be made I am of opinion that the petitioners are entitled to the order they pray, except as to the costs, the whole of which must be paid out of the fund recovered."

7. MATSON v. SWIFT. 8 Beav. 683.

Probate Duty — Conversion.

"In case where a man dieth intestate, the ordinary shall depute of the next and most lawful friends of the dead person intestate to administer his *goods*." Such is the language of the statute 31 Edw. III. st. i. c. xi.; but with reference to the revenue laws of the kingdom, questions from time to time arise as to the extent and meaning of the term "*goods*," in consequence of the necessity of ascertaining the amount of duty payable upon the grant of probate or letters of administration. "*Whatever*" (said Lord Abinger in *Attorney-General v. Bowens*, 4 M. & W. 171.) "*may have been the origin of the jurisdiction of the ordinary to grant probate, it is*

clear that it can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy." Probate duty, therefore, applies only to such property as falls under the designation of "goods" within the statute of Edward III. In the case before us the testator had executed a trust deed for the sale and conversion into money of his real estate. No sale took place during his life; but about two years afterwards the trustees raised a sum of 10,000*l.* and upwards by a sale of part of the estates. In administering the testator's estate, the money thus raised was treated as part of his personalty, and under these circumstances probate duty was claimed by the Government. It was admitted on the part of the Crown, that, if the conversion had taken place under a will, the duties could not have been claimed, as the estate would then have continued realty until the testator's decease. But it was contended that the trust-deed executed by the testator had so completely impressed his realty with the character of personalty during his life, that the duty attached upon it as such in the usual way. Lord Langdale, M. R., was of opinion, that the ordinary had no jurisdiction over real estate thus circumstanced, and that the proceeds of the sale were not in the control of the executor. His lordship, upon these grounds, gave judgment against the Crown.

8. TAYLOR v. HAYGARTH. 14 Sim. 8.

Trust Estate — Prerogative — Bona Vacantia.

The prerogatives of the Crown are not favoured in equity. Hence, in those cases where the prerogative can be made available to the Crown only through the medium of the peculiar doctrines of construction, which are of daily and familiar application in courts of equity, as between subject and subject, the Court of Chancery refuses to exercise its jurisdiction for the benefit of the Crown. "The Crown," says Lord Chancellor Loughborough¹, "comes under no head of equity." Accordingly, in the case of *Walker v. Deane*¹, where the will directed the trustees to lay out trust money in the purchase of freehold or leasehold estates, and the objects of the trust failed, the Court refused to impress upon the money the quality of land, so as to enable the Crown to claim by escheat. The claim of the Crown was alike repelled in *Burgess v. Wheate*, by the decision that a trust estate does not

¹ *Walker v. Deane*, 2 Ves. Jun. 185.

escheat to the Crown for want of an heir to the *cestui que* trust ; so that, in default of such heir, the trustee remains seised to his own use, he being, in the eye of the law, a perfect tenant, and the Court of Chancery giving no effect to the doctrine of escheat in such a case. In *Henchman v. the Attorney General*¹, where the testatrix had directed the property in question to be sold, the same subject came under discussion before Lord Brougham C., who said, "As the lord cannot take ; as, beyond all question, the Crown cannot take ; and as there is here no heir of the testator, the devisee alone can take. He takes from necessity, indeed, and because there is none other to take, the resulting trust failing for want of a *cestui que* trust." Upon the authority of the two above-cited cases, the law regarding the non-escheat of trust estates, in default of an heir to the *cestui que* trust, was too clear for a doubt. But, in commenting upon *Burgess v. Wheate*, the learned editors of *Co. Litt.* raised another question in the following terms : "In *Burgess v. Wheate*, Lord Mansfield endeavoured to establish the right of the Crown to the benefit of a trust which failed for want of an heir, by attempting to fix on trusts the feudal incident of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the Crown. A better ground in favour of the claim of the Crown might, perhaps, have been found by resorting to its acknowledged prerogative of being entitled to *bona vacantia*, or every species of property of which no owner is discoverable."² The hint thus given was taken advantage of in *Taylor v. Haygarth*. There the testatrix in the cause gave the residue of her property, real and personal, to her executors, in trust for sale *immediately after her death* ; and she directed her trustees, after providing for certain annuities, to stand possessed of the capital, in trust for such persons as she should direct by a codicil to her will. She died in 1838, seised and possessed of freehold, copyhold, and personal estate, but without having made any codicil. She was illegitimate by birth, and had never been married ; and, consequently, she left neither heir nor next of kin. The trustees made sale of the realty pursuant to the directions of the will, and invested the greater part of the proceeds in stock ; and under these circumstances the question arose, whether the stock thus representing the realty belonged to the trustees or to the Crown ; the latter claiming the stock as *bona vacantia*, and for that purpose contending that the land was, by the terms of the will, definitively and

¹ *Myl. & Keen* 494.² *Co. Litt.* 191 a., by Harg.

indelibly impressed with the character of personalty. On the side of the trustees, however, the case of *Hill v. Cock* was cited, where Lord Eldon says: "The rule in equity is clear, that where real estate is directed to be converted into personal for a purpose expressed, which purpose fails, either wholly or partially, in the former case, though the estate has been converted, the whole produce of that conversion will still be real estate." The V. C. of England: "The only question that remains to be disposed of relates to the real estate. Now, whatever opinion might have been originally entertained about *Burgess v. Wheate*, it has remained unreversed for more than eighty years; and, consequently, it must be considered as binding upon the Court. It is observable that it is not the decision of one judge against another, but of Lord Keeper Henley and Sir Thomas Clarke M. R. against the opinion of Lord Mansfield. The M. R. and the Lord Keeper agreed upon a point of equity against the C. J. of the King's Bench . . . and, in deciding the present case, I must take it to be the law. Now it was said, that, inasmuch as there was clearly a direction in the will that the real estate should be sold, therefore the Crown is entitled to the money that might have arisen from the sale. Upon that point I referred to *Walker v. Deane*¹, not so much for the decision as for the sake of the positive proposition which is laid down by Lord Loughborough in that case. His Lordship says: "Is there any reason to raise an equity to convert the money into a different species of property in order to create a different effect? There is no person claiming under the will of the testator appearing to insist that it shall be considered as that which, *de facto*, it is not. *The Crown comes under no head of equity*. I think it would be a great stretch even if that circumstance of the option [to invest either in freehold or leasehold estate] was wanting; but, with that circumstance, to convert it for the Crown is too extraordinary for a court of equity. Therefore, the broad proposition is, that the Crown comes under no head of equity. . . . Here, in order to give a right to the Crown, it is absolutely necessary that the equity should be enforced, or at least enforceable, for the purpose of converting the freehold estate in fee simple into the description of personalty; and the real question is, whether, attending to the authorities, there is an equity to compel the conversion for the Crown. Now I have the authority of the opinion expressed by Lord Loughborough against the existence of any such equity; and, without assuming to myself the jurisdiction of the House of Lords, and entering into the

¹ 2 Ves. Jun. 185.

question whether the decision of Lord Chancellor Brougham, in *Henchman v. the Attorney-General*¹, is right or wrong, it is quite sufficient for me to say, that, in making the decision which he did, he evidently referred to and relied upon the opinion expressed in the case of *Walker v. Deane*.² Then, as far as the question about the legal estate goes, I have the decision of a Court of Equity that the Crown shall not take it by escheat. And I have the opinion of two Lord Chancellors in succession, that there is no equity for the Crown to call for a conversion of the land, in order that the Crown may take the produce of it. . . . My opinion is, that the Crown has no equity to take from the devisees [the trustees] the produce of the estate which they have sold of their own authority."

9. *SANDER v. SANDER*. 2 Coll. 276.

Partnership — Insanity — Dissolution.

This case deserves notice as an express authority upon the point that insanity of a partner is a ground for a dissolution of the co-partnership: and the V. C. Knight Bruce decreed a dissolution as from the date of the decree.

10. *Ex parte PEPPER*. 2 Jones & Latouche, 95.

Trustee Act — Practice.

The construction of the statute 1 W. 4. c. 60., appears to have been very frequently the subject of adjudication in the Irish Chancery during the years that Sir Edward Sugden has presided in that court. The profession has consequently the benefit of the opinion of the framer of the act upon various important points connected with its application. The case before us appears to be altogether new in its circumstances. Certain stocks and moneys were vested in trustees upon the marriage of the petitioners, Pepper and wife: and the settlement contained a power, with the consent of the husband and wife, to invest the trust money at interest in government or private security, provided that such private security should be approved by the opinion of counsel for all parties as to its propriety, safety, and validity. Then followed a power to the husband and wife to appoint a new trustee in the room of any trustee who should (among other disqualifications) refuse or neglect to act in the trusts, and also to change the trustees when-

¹ 3 Myl. & Keen, 494.

² 2 Ves. Jun. 185,

ever the husband and wife should think it expedient. Under the powers of the settlement the husband and wife became desirous of investing some of the trust moneys in a private security, which Tuckey, one of the trustees, declined to approve. Thereupon the husband and wife, by deed of July 11th, 1844, appointed a new trustee in Tuckey's room, and by letter required Tuckey to concur in transferring the trust-funds to the other old trustee and the new trustee jointly. Tuckey objected to comply with this requisition on the ground that a legal doubt had been raised whether the substitution of a new trustee would exonerate Tuckey from responsibility. The petitioners prayed for a reference to the Master to inquire whether the deed of July, 1844, was good and valid, and if so, then that Tuckey might be ordered to make the transfer. The 10th and 11th sections of the act were relied upon. Lord Chancellor Sugden. " The old trustee is not under any disability, nor unwilling to act in the trust; he exercised his discretion, and refused to do the act required; stating, however, that he was willing to be discharged from the trust under the sanction of the court. I do not think this is a case within the statute. The trustee has only done his duty; he *bonâ fide* refused to lend the trust money, because he thought the security offered was not a proper one. No order of mine would absolve him from responsibility; for the 10th section of the act only applies to cases where the trustee really neglects to perform his duty. Here the trustee did not refuse to execute his trust. Even though I may have the power, I think I ought not to exercise it, in order to enable the parties to carry their intention into execution. The trustee has no right to call upon the court in this summary manner to sanction his transfer of the property; but he has acted properly in not allowing the money to be lent upon any but good security. The act was not intended to give a sanction to a trustee to resign his trust, rather than do an act which he deems improper. Such a settlement is well calculated to embarrass any trustee attentive to his duty. I refuse the application."

11. PANNELL v. HURLEY. 2 Coll. 241.

Breach of Trust — Banker's Accounts.

The doctrine of responsibility for breaches of trust is exercised with much rigour by the Court of Chancery, towards all participants in such transactions. That a trustee should be held liable to the utmost extent for all departures from the strict line of duty,

is both just and intelligible ; but few persons are aware of the risks which they incur by co-operating, how innocently soever in point of intention, in proceedings which are connected with, and accompanied by even constructive notice of, a subsisting trust. In 1814 one Pannell executed a conveyance to three trustees, Clarke, Bussell, and Davy, in trust for sale and payment of Pannell's creditors. Soon afterwards the trustees opened an account with Skinner, Brown, and Co., bankers, for the use of the trust estate, under the title "Pannell's Estate — Clarke, Bussell, and Davy." In 1826 the firm of Skinner and Co. was dissolved, and a new firm was established by Skinner and the defendant Hurley, who opened new books and issued new notes ; but the books of the old firm were retained, and many of the old customers continued their accounts with the new house. Pannell's trust account was thus continued : but in consequence of the deaths of Clarke and Russell, the title of the account was thenceforward headed "H. Pannell's Estate, per J. Davy, trustee." In 1830, the banking firm consisted of the defendant Hurley, Whitter, and Brown, and so continued until 1834, when Brown, who also traded as a clothier, in partnership with his son and Davy the trustee, became bankrupt. In 1833, Pannell's trust account was closed by Davy, who being then indebted to the bank in one sum on his private account, and in another sum on the joint account of himself and Brown and Son, and having a balance of 308*l.* standing to the credit of the trust account, drew in person at the bank two cheques against the trust account for two sums, which together exhausted the balance, and placed the two cheques to the credit of the two debtors' accounts above mentioned. This having been done, the trust account terminated, and was never afterwards revived or re-opened. The object of the present suit was to render Hurley, and Whitter, and Brown (who had obtained his certificate) liable as bankers to refund to the trust estate the sum of 308*l.* thus misapplied. Hurley and Whitter, in their defence, averred that, except by the running title of the trust account in their books, they had no notice of the said sum of 308*l.* being subject to the trusts of the deed of 1814 ; and that the cheques were drawn without the privity of themselves and Brown. It was proved, however, that Hurley was a creditor of Pannell, and had executed the trust-deed, and attended meetings of his creditors ; and that Whitter was formerly partner with a solicitor at the time when the matter of Pannell's trust-deed was in progress at their office. Under these circumstances

the court decreed, without hesitation, that Hurley and Whitter should refund the money in question; but intimated that if the only notice of the trust had consisted in the title of the account in the bank-books, there might have been more difficulty in the case.—Vice Chancellor Knight Bruce: “Money is due from A. to B. in trust for C. B. is indebted to A. on his own account. A., with knowledge of the trust, concurs with B. in setting one debt against the other, which is done without C.’s consent. Can it be a question in Equity whether such a transaction can stand? There is nothing more in the case than that the debt of 300*l.* and a fraction remains due from Hurley and Whitter to the trust estate.”

12. MARTIN v. MAUGHAM. 14 Sim. 230.

Legacy — Forfeiture — Restraint on Alienation.

By a codicil of Samuel Butler, the testator in this cause, he gave several annuities; and he begged it might be understood and remembered that his will and desire was, that, in case any of his annuitants should *attempt to sell or dispose* of their interest in his annuities to them, from that moment his bequest to them was to terminate for ever, and the principal and interest of each bequest to revert to his general fund as specified in his will. One of the annuitants petitioned the Insolvent Court, under the stat. 1 & 2 Vict. c. 110. s. 35., stating that *he was willing* that all his property should be vested in the provisional assignee according to the terms of the act, and praying to be discharged from custody. The Vice-Chancellor of England said there could be no doubt the annuity was gone; and, with respect to the time at which it ceased to be payable, that the presentation of the petition was an attempt to dispose of it, and therefore that it ceased on the presentation of the petition.

13. ADAMS v. BARRY. 2 Coll. 285.

Pleading — Statute of Limitations.

In this case, which was a suit against an executor for the recovery of assets, the defendant pleaded the “Statute of Limitations” in the singular number, and an objection was taken on this ground to the defendant having the benefit of the lapse of time which had occurred. Vice-Chancellor Knight Bruce. “It

has been said that the administrator claiming the benefit of the 'Statute of Limitations' (singularly) is in that respect insufficiently expressed, and cannot entitle them to the benefit of any statutory protection, on the ground of lapse of time. It does not, however, strike me so. I think that I may properly consider the administrator as claiming the benefit of the 'Statute Law of Limitations,' as claiming such, if any, benefit as may be claimable of the statute of King James, of Lord Tenterden's Act, and of the statute of King William the Fourth respectively."

14. COCKSEGE v. COCKSEGE. 14 Sim. 244.

Baron and Feme — Provision for Separation — Public Policy.

In this case, the ante-nuptial articles for a settlement of the husband's real estate, contained a clause securing to the wife an annuity of 400*l.* in the event of *any separation* taking place. In August, 1843, the husband left his wife on an imputation of her having committed adultery. The bill was filed by the wife and her trustee against the husband, praying specific performance of the articles; and a motion having been made by her for a recovery before the Vice-Chancellor of England, his honour refused to make any order, but gave leave to bring an action on the covenant. The Vice-Chancellor of England. "Where the contract is, that in the event of *any separation* taking place between the husband and wife, the husband shall make a certain provision for his wife, the Court sees that it is an inducement to the wife to be guilty of the worst conduct. There may be innocent as well as guilty causes of separation; but where the covenant by which the provision is secured to the wife is expressed in general terms, as it is in the present case, the Court cannot sever it, and say that it shall be good in one case and bad in another. . . . Unless I have it made out that the contract in this case is such as this Court will enforce, I cannot grant the motion."

15. GEE v. GURNEY. 2 Coll. 486.

Power of Appointment — Fraudulent Execution.

Wherever a party concerned, or exercising influence, in the preparation of a deed or will, eventually takes under the instrument a benefit not immediately intended or contemplated to be conferred upon him, a presumption of fraud or sinister motive arises, and shakes his title to the property thus derived. If the

party thus situated is a professional man, the presumption arises with increased force; as in *Seagrave v. Kirwan* (1 Beat. 164.), before Lord Chancellor Hart, where in the case of a barrister who, as a private friend of the testator, had drawn the will under which he eventually became entitled as executor to claim a residuary fund for his own use, and gave no evidence of his having explained this possible result to the testator, his lordship deprived the executor of the benefit thus acquired, and declared him a trustee for the next of kin. The present case approached *Seagrave v. Kirwan* in some of its circumstances.

A married woman, having a power to appoint a fund to and among her children after her death, had issue one child, to whom, when only five or six weeks old, she appointed the fund by deed accordingly. Her husband was a *solicitor*, who assisted in preparing the deed. The deed was alleged to have been hastily prepared. It was not stamped before execution, and the husband was one of the two attesting witnesses. The child died in July, 1818, four months after the execution of this deed; and the mother died in February, 1842. The husband then took out administration to the child and claimed the fund. Under these circumstances, the deed was impeached as suspicious in its origin, and unfairly obtained by the husband for his own ultimate advantage. The Vice-Chancellor Knight Bruce was of opinion that the circumstances rendered it impossible for him to act for or against the deed without the assistance of a jury; and issues were accordingly directed for the trial of the validity of the deed at law, so as to ascertain expressly whether it was fairly obtained from the wife, or extracted from her with any fraudulent intent.

16. *MATHIE v. EDWARDS.* 2 Coll. 465.

Mortgagee — Power of Sale — Oppressive Conduct.

The facts of this case were of a very long and complicated nature; but they involved the simple question, Whether or not the conduct of the mortgagee in his mode of exercising a power of sale was oppressive and improper? The subject of the mortgage was a reversionary interest in money expectant on the death of the mortgagor's wife without issue by him. He died before his wife: and, a few weeks after his death, the mortgagee, under his power of sale, advertised the property for sale as a reversion expectant on the death of a widow lady "aged thirty or thereabouts,"—

a description so loose as to discourage cautious purchasers; and made no offer to satisfy or guarantee the purchaser against the possibility of the widow having issue by her late husband, although a short delay of the sale would have put that contingency beyond a doubt. The V. C. Knight Bruce was of opinion that this was, under the circumstances, an improvident sale, and unsustainable against parties interested in the equity of redemption. It will be sufficient for the present purpose to quote one passage from His Honour's judgment. "I apprehend," observed the learned judge, "that a mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary; but is, as between them, bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable."

17. *BEAUCLERK v. ASHBURNHAM.* 8 Beav. 322.

Trustees — Imperative Trusts — Leaseholds.

The incautious acceptance of trusts is productive of great risk and inconvenience to trustees; and the present case very clearly exhibits the consequences of such imprudence. A marriage settlement, not drawn in the ordinary form, required the trustees, "with the consent *and by the direction*" of the tenant for life, to invest the trust funds in freehold or copyhold hereditaments, or in *leasehold* hereditaments held for an unexpired term of sixty years. The tenant for life became desirous of investing the trust funds in the purchase of two leasehold houses situate near Belgrave Square, London, and made the necessary requisition, in writing, to the trustees accordingly. They objected to the purchase, on the ground that, by taking to themselves an assignment of the leaseholds, they would become *personally* liable to the covenants. But Lord Langdale M. R. held that they could not, on that ground, escape from the performance of the trust, which, having been accepted, was become imperative, and must therefore be performed, whatever might be the consequences to the trustees.

III.—POINTS IN THE LAW OF DEBTOR AND CREDITOR.

1. Proceedings under Stat. 5 & 6 Vict. c. 122.
2. Principal and Surety — Joint Judgment — Administration of Assets.
3. Fraudulent Preference — Goods and Chattels — Bankrupt Act.

1. COVINGTON V. HOGARTH. 7 M. & G. 1013.

Proceedings under Stat. 5 & 6 Vict. c. 122.

In this case the plaintiff filed an affidavit of debt in the Court of Bankruptcy, and commenced proceedings under the 5 & 6 Vict. c. 122., for recovery of a debt due to him from the defendant for work and labour and for money paid to the defendant's use. He, at the same time, commenced an action for recovery of the same debt and the costs. Defendant was afterwards summoned before the Court of Bankruptcy and there filed an admission of his debt, and shortly after paid the amount to the plaintiff's attorney. Plaintiff subsequently proceeded with the action, whereupon defendant obtained a rule calling upon plaintiff to show cause why all further proceedings in the cause should not be stayed, the plaintiff having recovered and obtained payment of the debt for which the action was brought, under the proceedings in the Court of Bankruptcy, and having given the defendant a discharge for the same. The rule was, after argument, discharged. Tindal C. J. "I cannot help thinking that the 5 & 6 Vict. c. 122., which speaks (sect. 13.) of the trader's entering into "a bond, in such sum, and with two sufficient sureties, as the Court shall approve of, to pay such sum as shall be recovered *in any* action which shall have been brought, or shall thereafter be brought," contemplated the pendency of an action at the same time with the proceedings authorised by the statute. The 6 Geo. 4. c. 16. s. 59. expressly provides 'that no creditor who has brought any action, or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, without relinquishing such action or suit.' The 5 & 6 Vict. c. 122. being silent on the subject, I see no reason why the creditor should be debarred from pursuing the double remedy. In cases where the debt is paid after action brought, I think the action can only be put an end to by the ordinary course, viz. by a rule for staying proceedings on payment of costs." — Maule J. "We are now called upon to apply the

equity of the 6 Geo. 4. c. 16. s 59. to the enactments of the 5 & 6 Vict. c. 122. The provisions of the two acts relate to totally different states of circumstances. Where the debt is really due, if the party wishes to avert the penal consequences provided by the second act, he may do so by giving security. If he has a good defence he may go on with the action, and if the defence is successful, he will obtain his costs; if otherwise, he must pay costs. That which the Court are now asked to do, would not be enlarging the benefit of that statute, but applying it to a state of things to which it was not intended to apply. The action having been properly brought, the defendant is not entitled to relief, except upon payment of the debt and costs."

2. HATCHELL V SUTTON, 2. Jones & Latouche, 44.

Principal and Surety — Joint Judgment.

Pigott as the principal debtor, and Sutton as his surety, executed a joint bond, upon which judgment was entered up. Sutton died, and the present suit was instituted for the administration of his estate. Pigott, in his capacity of a trustee, was a party to the suit, and the bill had been taken *pro confesso* against him. Day, the bond creditor, sought to prove his debt against the estate of Sutton, the surety; but this claim was opposed on the ground that the principal debtor was not, in that character, a party to the suit. No authority was cited on behalf of the creditor. Lord Chancellor Sugden. "I do not recollect any case like the present, and I must have an authority for doing what I am now asked—to allow this person to prove his demand against the estate of the deceased, the surety. The judgment being *joint*, the creditor might, at law, have proceeded against the surviving conusor, and the heir, and terre-tenants of the deceased; but here he desires to come in under the decree for the administration of the assets of the surety, the principal debtor not being a party to the suit as such. To do so would be to give him a remedy in this Court far beyond his legal right; and the legal right is the measure of his equity. If no authority in equity for the creditor can be cited, I must leave him to file his bill. Could the creditor file a bill on foot of this judgment against the surety without bringing the principal debtor before the Court? I must, if no authority be cited, rule the special point against the creditor. I only decide that the creditor has not a right to be paid his demand in this suit."

3. *Ex Parte SIMPSON.* 1 De Gex, 9.

Fraudulent Preference — “*Goods and Chattels*” — Stat. 6 Geo. IV. c. 16. § 3.

Two questions arose in this case : 1. Whether a fraudulent preference of certain creditors had taken place? and, 2. Whether the words “goods and chattels,” in the third section of the Bankrupt Act, comprehended money? It appeared that, after the bankrupts had, at a consultation with their solicitors, come to a resolution of stopping payment, they drew three cheques and appropriated them to the use of three different creditors. Time was given for the presentment of the cheques; and afterwards, on the same day, the bankrupts sent a notice to their London bankers to make no further payments. The cheques were paid before the receipt of this notice; and the first question was, whether these proceedings amounted to a fraudulent preference? The first of the cheques was for 1200*l.*, and was given to the firm of Vaughan and Co., to meet an accommodation acceptance of that firm in favour of one of the bankrupts; the second cheque was for 575*l.*, and was given in respect of an acceptance by consignees, whom the bankrupts had undertaken to keep clear of cash advances; and the third cheque (for 200*l.*) was given to the solicitor of the bankrupts for business already done, but for which no bill of costs had been delivered. Allowing that the delivery and payment of these cheques constituted a fraudulent preference, if money could be properly included in the expression “goods and chattels” in the third section of the Bankrupt Act, then the second question arose, Whether such a construction of the Bankrupt Act was admissible? The Commissioners decided both points against the bankrupts. The following is an extract from the argument: “The finding of the Commissioners was erroneous, and contrary to the law as laid down by Tindal C. J. in *Bevan v. Nunn*¹, where his lordship is reported to have held that payment of money could not be a delivery of goods and chattels within the meaning of the act. [Knight Bruce C. J. But in *Bevan v. Nunn* the Court held that an act of bankruptcy had been committed.] Because there had been there a delivery of goods; but Tindal C. J. clearly held that a payment of money would be insufficient. [Knight Bruce C. J. Do you contend that, though, if a man gave a table or chair, it may be a fraudulent preference so as to constitute an act of bankruptcy; yet if he give a purse of gold it cannot?] That was the distinction; and, as we submit, it was well founded.

¹ 9 Bing. 107.

By giving a purse of gold you pay the debt, but you do not by giving a table or a chair ; the former act is the fulfilment of an existing contract, the latter the creation of a new one. If, owing money, I go to my creditor, and say, I have no money, but I will give you a horse, will you take it ? and he consents, that is a new contract. [Knight Bruce C. J. According to this argument, payment in Napoleons might be an act of bankruptcy, though payment in sovereigns could not."] Judgment. Knight Bruce C. J. "I do not mean finally to dispose of this case until I shall have looked at some of the authorities again, and received a communication from the Lord C. J. of the Common Pleas, to whom I have written : but I think it right to state my present impression. . . .

. It is plain that the firm was, on the 11th of September, 1844, in a state of insolvency, and I think that it must be taken to have been known at the time to be so by Mr. Smith, the resident partner. Mr. Smith advises with his solicitor on that day, and the result of that advice was, that the firm should stop payment, that is, should not on the following Monday, which was the next business day (the morrow for every substantial purpose), resume the trade, but that there should be either a stoppage or suspension of payment ; and accordingly, under the advice and with the concurrence of the solicitor, a notice is sent to the Bank of England, who acted as bankers for the firm, and where their acceptances were made payable, and where their acceptances would be presented for payment on the Monday to the amount of several thousand pounds, not to make any further payment. The firm, therefore, on Monday was, I do not use the words in any disrespectful sense, a dishonoured firm ; it had lost its mercantile credit.

As part of the same transaction, in every sense of the expression, there was a resolution (in conformity with the advice of the solicitor) to suspend all the payments as of, or as from Saturday. In the mean time cheques were drawn in respect of debts due to different persons with whom Mr. Smith and his partners appears to have been on terms of friendship ; one was the house of Vaughan and Co., which comprised the brother of the gentleman who appears to have been the confidential clerk of the firm in question, and which appears to have been in the habit of affording them accommodation. There was no doubt, a desire to save them harmless as far as possible ; a desire that may in one sense, perhaps, be called honourable. It may be fair to suppose that there was a request or demand for the money ; but I cannot hold that there was pressure. There is nothing in the evidence to warrant me in

doing so in respect of this debt. If that cheque had been sent to Vaughan and Co. before the resolution to stop payment on Monday, they might have stood on a different footing. It is, however, sent to Vaughan and Co. as a part of the same transaction: this was the cheque for 100*l*. Another of the cheques is given to one of the partners, one of the bankrupts, for the purpose of relieving the liabilities of a cousin of his, of the same name, who had also assisted the firm. He knew nothing of it, but he received the benefit of it, and thereby adopted the agency of his cousin for that particular purpose. Putting myself in the situation of a jury having to determine the question, I cannot say that there was any pressure from that gentleman; it would perhaps be absurd to suggest that there was any pressure. With regard to the solicitor the amount due to him was not known, but a rough guess was made, and a cheque for 200*l*. was given to him, and accepted as an integral part of the same transaction, in which, with his assistance, the notice was given. There was no pressure there. I repeat that these payments were all made by traders resolved to stop payment on that which, for every mercantile purpose, may be called the next day, and without pressure. . . . Matters were in such a state that the course to be taken on Monday would of necessity bring all the creditors down on the parties Looking at the state in which the firm was on the 11th of September; looking at that which was within the knowledge of Mr. Smith on the 11th of September; looking at the act which he did contemporaneously with the drawing of these three cheques, and to the stoppage on Monday; and looking at what I think established—the absence of pressure for either of the three payments, and the willingness of each of the persons to whom the payments were made to wait—I am of opinion at present, that these acts together (I do not say either of them separately; how that might be or would be I do not say; but that these three acts together) amounted to a fraudulent preference, or comprised at least an act of fraudulent preference. It is said that this depends on the meaning of the words “goods and chattels in the third section of the act 6 Geo. 4. c. 16.” I am at present of opinion that the payment of *money* by a debtor to a creditor under such circumstances is a fraudulent delivery of goods and chattels; but I reserve my judgment on that point till I shall have received a communication from the Lord C. J. of the Common Pleas; if his lordship shall tell me that he is of an opinion different from mine, I will anxiously reconsider the matter.”

On a subsequent day His Honour announced, as the result of his communication with the Lord C. J. Tindal, that that learned judge continued to hold the same opinion which he expressed in *Bevan v. Nunn*, respecting the construction of the words "goods and chattels" in the third section of the Bankruptcy Act. His Honour, however, felt bound to entertain a different opinion, and decided accordingly, that money was comprehended in the words "goods and chattels."

IV. POINTS IN THE LAW OF PROPERTY.

1. Mortgagees of Equitable Estates — Notice. 2. Power — Construction — Will Act. 3. Joint-tenancy — Assignees. 4. Advowson — Trust — Jurisdiction. 5. Feme Covert — separate Estate — Restraint on Anticipation.

1. *WILMOT v. PIKE*, 5 Hare, 14.

1. *Mortgagees of Equitable Estates — Notice.*

It is unnecessary to give a statement of the facts of this case, which was a contest for priority among several mortgagees of an equitable estate in land. It was insisted by one of the *puisne* mortgagees, of whose security the trustee of the legal estate had had notice that he had acquired priority over an elder mortgagee, by reason of the latter having made default in giving notice of his security to the trustee; and that the doctrine of notice, as applied by Sir Thomas Plumer, M. R., in *Dearle v. Hall*, and *Loveridge v. Cooper* (3 Russ. 1. 30.), to mortgagees of choses in action, was equally applicable to mortgagees of equitable estates in land. But Vice-Chancellor Wigram decided that the doctrine of notice had no application whatever to equitable estates in land; and that an elder mortgagee's priority over a *puisne* mortgagee of such estates, was not in anywise affected by the doctrine of notice, which is so material in the case of a mortgagee of a chose in action.

2. BUCKELL v. BLENKHORN. 5 Hare, 131.

Power — Construction — Will Act.

The question in this cause arose upon the terms of a power contained in a deed, whereby certain trust funds became vested in trustees in trust for such persons, &c. as the donee of the power should by any deed or deeds, *writing or writings*, with or without power of reversion and new appointment, to be by her *sealed* and delivered in the presence of and attested by one witness or more, direct or appoint. The donee of the power exercised it by a will duly executed and attested according to the late Statute of Wills, 7 W. 4. and 1 Vict. c. 26. The plaintiff argued against the sufficiency of this instrument as an appointment of the funds. But the Court declared the appointment valid. Vice-Chancellor Wigram: "Before the Wills Act the word '*writing*,' in cases like the present, had received a judicial interpretation which included a will. But the Courts held that they could not dispense with the legal formalities prescribed by the instrument creating the power, — although they were not necessary to the validity of a will, — because those forms, being in themselves without value, could have no equivalent. Now, by the late Statute of Wills, it is provided, that, in the execution of Wills, one given form shall be observed, and that such form shall be an equivalent for every arbitrary form of execution which the donor of a power may prescribe What reason, then, is there for saying that a will shall not, since as well as before the Statute, be deemed a writing within the terms of the deed? A decision in accordance with the plaintiff's arguments would be against the spirit and policy, as well as against the letter of the act."

3. MAN v. RICKETTS. 1 Phill. 617.

Joint Tenancy—Assignees.

The Lord Chancellor Lyndhurst decided in this case, that under the Bankrupt Court Act (1 & 2 W. 4. c. 56. s. 25.), the title of the official assignee and the creditor's assignee to the bankrupt's estate is *joint*, so that upon the death of the creditor's assignee the right of prosecuting the suit survived to the official assignee, and *vice versâ*. It will be remembered that the official assignee and the creditor's assignee are appointed at different times, while it is laid down in the books (2 Bl. Comm. 180.), as an express incident of joint-tenancy at common law, and irrespective of the

Statute of Uses, that the eestates of the respective joint tenants commence at one and the same time : but the decision in the case before us proceeds wholly on the interpretation of the statute.

4. *JOHNSTONE v. BABER.* 8 Beav. 233.

Advowson — Trust — Jurisdiction.

The Court of Chancery has no jurisdiction to direct a sale of property, except for the payment of a testator's debt, or in execution of the trusts of a deed or will. The fact that a proposed sale will be beneficial to cestuisque trust or to infants, is no argument for the assumption of such a power. It was accordingly denied by Lord Langdale, M. R., in the case of an infant entitled to a copyhold estate : and his Lordship followed the same course in the case before us, in which an advowson had been devised to trustees in trust to sell the same after the death of the present incumbent, and divide the produce among the nine children of the incumbent. As upon the death of the incumbent, the advowson would not be saleable while the benefice was vacant, the trustees applied by petition for leave to sell during the incumbent's life. The application was resisted on the ground that a sale contrary to the trusts of the will would vitiate a purchaser's title, and of that opinion was the Court. Lord Langdale, M. R. : "If I proceed upon the notion of what might be beneficial to the parties, I should assume a legislative instead of a judicial power : I am of opinion that I can make no order like that asked."

5. *MEDLEY v. HORTON.* 14 Sim. 222.

Feme Covert — Separate Estate — Restraint in Anticipation.

It will be recollected that several cases have lately arisen in the Court of Chancery upon the construction of bequests containing restraints against anticipation of the separate estate of married women. In those cases the contest was, that the restraining clause applied solely to the power of appointment, and not to the separate estate itself. *Brown v. Bamford*¹, *Barrymore v. Ellis*², *Moore v. Moore*³, *Baggett v. Meux*.⁴ The present case was the converse of the foregoing cases. The testator, W. Horton, directed his executors to pay the interest of certain funds during

¹ 11 Sim. 127., reversed by Lord Lyndhurst.

² 8 Sim. 1.

³ 1 Coll. 54.

⁴ Ibid. 158.

the life of his daughter, Sarah Duckham, unto such person or persons as she shall from time to time during her life, whether covert or sole, authorise and appoint to receive the same, and in default of appointment unto her proper hands, for her sole and separate use; and he declared that the receipts of his daughter, or *of the persons whom she might authorise* to receive the same annual proceeds, should be an effectual discharge to the trustees; and that the trustees should always be at liberty to require from his daughter a separate authority or receipt from time to time for each quarterly payment, *it being his intention that the said annual interest and proceeds should not be sold, charged, or otherwise disposed of.* The daughter anticipated the bequest by an exercise of the power of apportionment, and the question was, whether the clause restraining anticipation applied to the power. The Vice-Chancellor of England decided that the apportionment was perfectly good, and that the restraining clause went for nothing, as there had been previously a general power given to dispose of the whole property.

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POSTSCRIPT.

THE County Courts Act is now about to be put in force throughout the country. On the 19th day of December last, notice under s. 8. (see *ante*, p. 197.), was given, that after the expiration of one calendar month, from the date of the publication of the notice in the London Gazette (22d of December.) Her Majesty, with the advice of her Privy Council, would take into consideration "the propriety of making orders for the purpose of the said act, and for putting the said act in execution *in every county throughout England and Wales.*" These orders are to be published in the London Gazette, and it is not to be wondered at that no little curiosity and expectation have been excited in the profession respecting the orders. With regard to the districts into which the country is to be divided, this is pretty well explained in an official letter to the Lord Chancellor from Mr. Bethune (to whom, as we mentioned in our last Number, the duty of forming them was mainly confided) which has been published in the newspapers. But the names of the judges have not yet transpired, and although the reports as to some of them will no doubt turn out authentic, we should serve no good purpose by giving the gossip of Westminster Hall on this matter. We can only now repeat that we take great interest in the measure, that we are prepared to support it, and that we shall from time to time devote a department of this work to give all the information as to its operation that we think likely to be useful. Already we see there are wishes expressed that it should have an equity jurisdiction of a limited amount, and we certainly anticipate consequences to result from it as affecting the present system of administering justice of the utmost importance.

There is a strong rumour of the reappointment of a Real Property Commission. Indeed, we know that several gentlemen have been asked to serve on it. We have already stated our opinion as to this step (p. 417.), which in some form or other is inevitable. We could have wished however that it should be a Parliamentary Commission, resting on the authority of an address to the Crown, and not merely on ministerial authority. At the time that this is written we believe that the Commission is not definitively formed.

The new arrangements for the conduct of Private Business in Parliament, of which we gave some account *antè*, p. 53, *et seq.*, are now in progress. The compliance with the standing orders has been proved before the Examiners appointed by the Speaker instead of a Committee on Standing Orders; and on application for certain private Bills, persons, usually either Barristers or Engineers, have been employed by the Woods and Forests, or the Admiralty, to take evidence on the spot as to the necessity for the Bill. The main difficulty remains, however, to be solved—as to how far the Committee on the Bills will deal with this evidence. It a subject of great interest.

An event, we may call it, of no trifling importance has taken place in France. The Minister of Justice, M. Martin, dignified with the sounding title du Nord, has retired, it is said for his health, and is succeeded by an able and intelligent man, M. Dumont. We believe the change to be permanent, and we heartily rejoice in it, excepting that we should be sorry it was owing to the ill health of any person. But the existence in the goverment of so incompetent a man, of one promoted from the state of a third-rate provincial advocate, and promoted only because he was a tool in the hands of the present party, was the great blot of the Soult-Guizot ministry. To this personage was ascribed the scandalous law of 1840, respecting the *affiches judiciaires*, to bribe the press, and corrupt the bench, as we have already explained. Let us now hope that it will be suffered to fall out of use, or be abrogated when its author finally retires.

BOOKS RECEIVED DURING THE LAST QUARTER.

A Practical Treatise on the Law of Partnership, including the Law relative to Joint Stock Companies. 1847. By Andrew Bisset, Esq., of Lincoln's Inn, Barrister-at-Law. Stevens and Norton.

A Selection of Leading Cases on Pleading and Parties to Actions, with Practical Notes. By W. Finlason, Esq., of the Middle Temple, Special Pleader. 1847. Stevens and Norton.

Commentaries on the Constitutional Law of England. By George Bowyar D. C. L. Barrister-at-Law. Second Edition. 1846. Richards.

A Practical Compendium of the Law and Usage of Mercantile Accounts. By Alexander Pulling, Esq., of the Inner Temple, Barrister-at-Law. H. Butterworth.

Letters on the present State of Legal Education in England and Ireland. By Henry Holmes Joy, Esq., Barrister-at-Law. Maxwell.

Lives of the Lord Chancellors. By John Lord Campbell. Vols. 4 and 5. 1846. John Murray.

A Treatise on the Stamp Laws. By Hugh Tihley, Assistant Solicitor of Stamps and Taxes. Stevens and Norton.

The Battle of Nibley Green, a Poem. From the Papers of a Templar. Colburn.

The Legal Practitioner and Solicitor's Monthly Journal. Nos. 1, 2, and 3. 1846 and 1847. Hastings.

ERRATA.

No. IX. p. 190. l. 8. from bottom, for *ξερ'*, read *ξεω'*.

For *τυμβον*, read *τυμβου*.

These are both errors of the press, and a severe but ill-informed critic has pointed out the former as not being such, but has wholly passed over the latter, and worse of the two. He also objects to *συλλησας*, as having two λ's; and it should have been written with only one. Nevertheless Constantine in Dict. p. 1688. gives *συλλας* (*diripio*, one of the meanings of *συλαω*), adding *alicubi ap. Herod. cum unico λ*.

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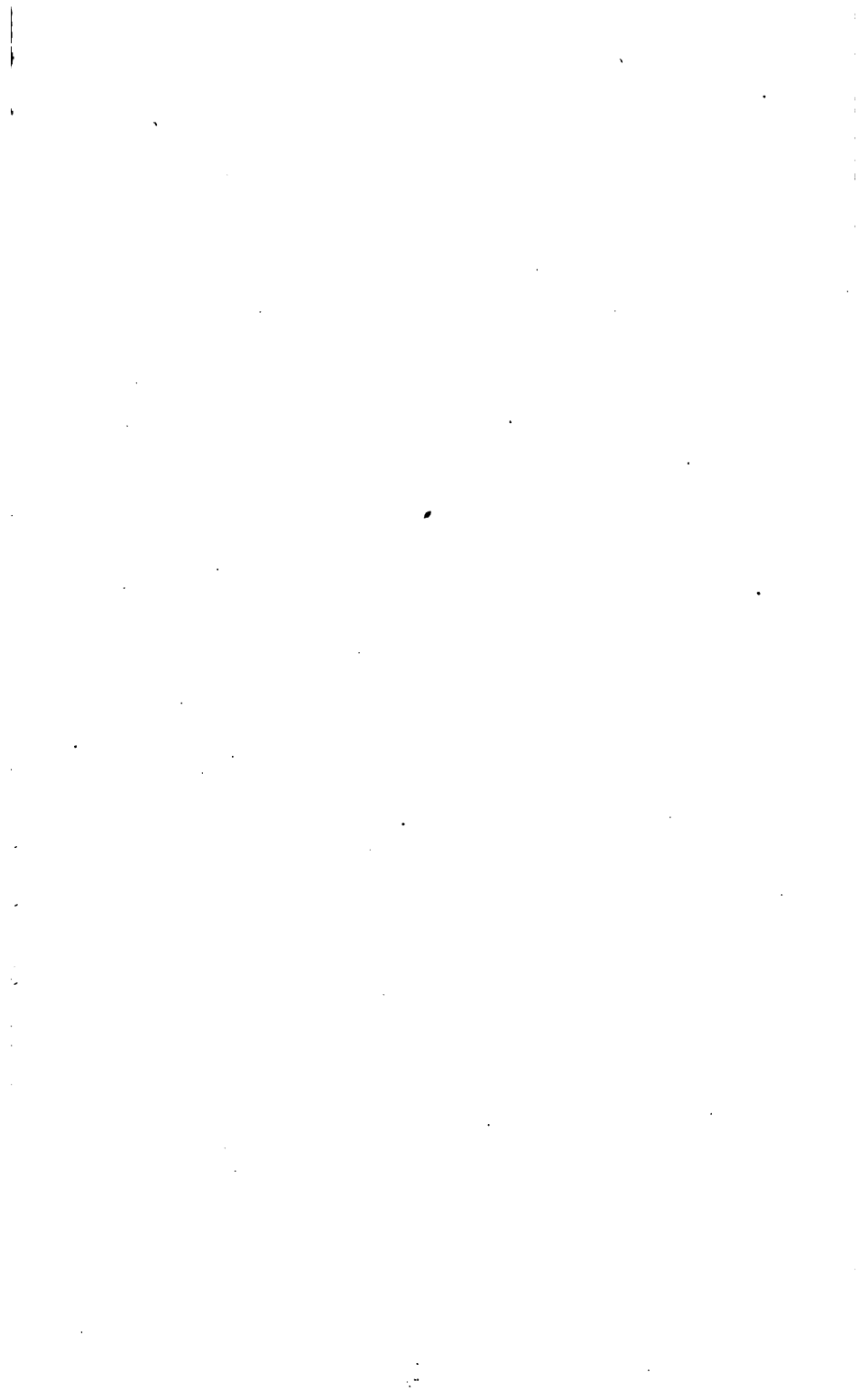
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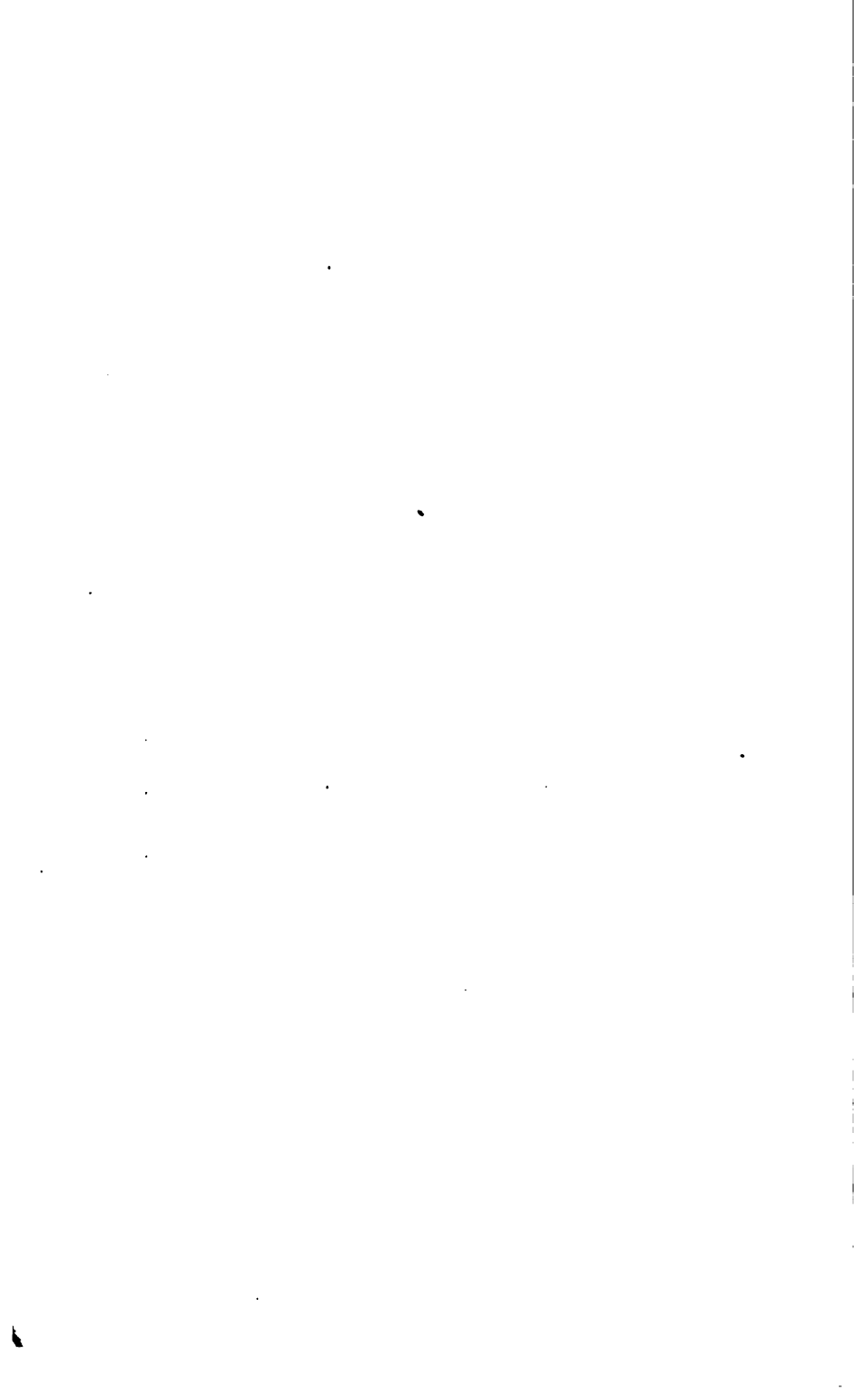
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